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PREME COURT, U. S.

Supreme Court, U. S.
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Supreme Court of the United States.

October Term, 1975.

GEORGE WAYNE MAHNKE,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

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Supreme Court of the United States.

October Term, 1975.

GEORGE WAYNE MAHNKE,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petitioner, George Wayne Mahnke, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts. Said judgment and opinion, dated October 7, 1975, vacated a verdict of murder in the second degree and the sentence imposed pursuant thereto by the Superior Court of Suffolk County, and remanded said case to said trial court ordering the entry of a verdict of guilty of manslaughter and directing that sentence be imposed thereupon. Said sentence, upon remand, was imposed on December 15, 1975.

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Opinion Below.

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts (Mass. Adv. Sh. (1975) 2897) appears in the appendix hereto. Also included in the appendix are:

1. The trial court's finding of fact and rulings of law on the petitioner's pre-trial motions to suppress evidence.
2. The order of the Supreme Judicial Court, dated January 8, 1975, directing the trial judge to make supplementary findings with respect to the voluntariness of statements made by the petitioner on December 9 and 10, 1971.
3. The supplementary findings of fact promulgated by the trial court on February 12, 1975.

The inclusion in said appendix of these findings and rulings are deemed necessary for a complete and comprehensive presentation of the issues formulated herein.

Jurisdiction.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Questions Presented.

The petitioner was kidnapped on December 8, 1971 at approximately 7:30 p.m. and was not released until 24 hours subsequent thereto. After ruling that all incriminatory statements made by the petitioner to his kidnappers from the commencement of his captivity until 4:15 p.m. on the following day, December 9, 1971, were inadmissible as the product of coercion, the trial court allowed into evidence incriminating statements and actions of the petitioner immediately subsequent thereto, but prior to his release.

I. Whether incriminating statements made by a kidnapped person to his kidnappers while still in their grip, can be constitutionally adjudicated to be acts of free will in accordance with the provisions of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

II. Whether the incriminating statements and actions of the petitioner subsequent to 4:15 p.m. on December 9, 1971, were excludable as "fruits of the poisonous tree" and/or under the "cat out of the bag" doctrine, as the direct product of the earlier coerced statements.

III. Whether the stare decisis of *Harris* v. *New York*, 401 U.S. 222; 91 S. Ct. 643; 28 L. Ed. 2d 1 (1971) applies to instances of intentional police misconduct.

Constitutional Provisions.

UNITED STATES CONSTITUTION,
FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

[4th] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[5th] No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any

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criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[6th] In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

[14th] Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case.

On June 27, 1973, in the Superior Court of Suffolk County, the petitioner was convicted by a jury of murder in the second degree and sentenced to imprisonment for and during the term of his natural life. Prior to trial, an evidentiary hearing was held on the petitioner's motions to suppress evidence, resulting in the promulgation by the trial court of findings of fact and rulings of law, commencing on page 69 of the Appendix. An appeal was timely perfected to the Supreme Judicial Court for the Commonwealth of Massachusetts and was orally argued before said court on May 7, 1974. On January 8, 1975, an order was promulgated by said court directing the trial judge to make "more complete findings" with regard to issues characterized in authorities cited as "break in the chain of events" and "cat out of the bag." Said order is reflected in the appendix commencing on page 1. On February 12, 1975, the trial court did promulgate said requested supplementary findings of fact which are reflected in the appendix, commencing on page 126. On October 7, 1975, the Supreme Judicial Court for the Commonwealth of Massachusetts, in a four to three decision, rendered its opinion resulting in its remand of the instant matter to the Superior Court directing that the verdict of murder in the second degree and the sentence imposed thereupon be vacated and that a verdict of guilty of manslaughter be entered with the petitioner being duly sentenced pursuant thereto. The majority of that court determined that there was no constitutional error in the admission of evidence at trial and predicated its directive for the entry of a verdict of a lesser degree of guilt upon its statutory authority of review in capital cases, as enunciated in M.G.L. c. 278, § 33E.[1] On December 15, 1975, petitioner was sentenced to a term of incarceration of not less than ten and not more than fifteen years at the Massachusetts Correctional Institution at Norfolk, Massachusetts.

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[1] Said statute provides in relevant part: "In a capital case as hereinafter defined the entry in the supreme judicial court shall transfer to that court the whole case for its consideration of the law and the evidence. Upon such consideration the court may, if satisfied that the verdict was against the law or the weight of the evidence . . . or for any other reason that justice may require (*a*) order a new trial or (*b*) direct the entry of a verdict of a lesser degree of guilt, and remand the case to the superior court for the imposition of sentence." Said statute designs a "capital case" as one in which the defendant was tried on an indictment for murder in the first degree and was convicted of murder either in the first or second degree.

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Statement of the Facts.

Rhonda Bornstein disappeared on the evening of September 15, 1970 and on December 9, 1971, her body was discovered buried under an abandoned set of railroad tracks running parallel to the M.B.T.A. tracks near the Sears, Roebuck parking lot in the Fenway, near the corner of Boylston Street, Boston, Massachusetts. Her father, Manuel Bornstein, had information to the effect that his daughter had arranged to meet with the petitioner on the evening of her disappearance and had, accordingly, ab initio, been convinced that the petitioner was involved in and/or had caused his daughter's disappearance. In the fifteen month period between September 15, 1970 and December 9, 1971, he enlisted the aid of many individuals who described themselves as "concerned persons" for the purpose of assisting him in attempting to locate his daughter's whereabouts. During this same period, and as a direct result of Mr. Bornstein's suspicions regarding the petitioner, a consistent activity of harassment was conducted against said petitioner, including but not limited to constant surveillance, assaults, attempted interrogation, attempted kidnapping, and ultimately, the effectuation of a kidnapping. These acts of hostility took place near the petitioner's home, at his place of business and at Northeastern University, where the petitioner was a student. During this same period, the investigation on behalf of the Boston Police Department was delegated to Detective Stanley Gawlinski, who first became associated with the investigation of the case on December 1, 1970 and who continued in active charge of the investigation of the case and the bringing of the instant indictments against the petitioner. Detective Gawlinski maintained consistent communication with Mr. Bornstein relative to his investigative activities and was aware of the nature

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of the activities being conducted by Mr. Bornstein and his group of "concerned citizens." The ineffectiveness of the harassment hereinabove generally described, as well as Mr. Bornstein's increasing dissatisfaction with the efforts of Detective Gawlinski (who had ultimately told Bornstein that without further evidence, such as a body, he could proceed no further in altering the status of the case from that of a "disappearance") culminated in the petitioner's being kidnapped in the early evening of December 8, 1971. The abduction was engaged in by Bornstein and five other individuals, to wit: Gary Fisher, James Ferreri, Frank Fontacchio, Jay Campbell and Jay Heard. The petitioner was forcibly taken to a cabin located in Worthington, Massachusetts, on December 8, 1971 and was not released until approximately 7:30 p.m. on December 9, 1971. He was held in the cabin from 10:30 p.m. on December 8, to 4:15 p.m. on December 9, 1971. During this period of time, as the result of intense interrogation predicated upon threats to his safety and life, the petitioner uttered incriminating statements, as a result of which he was transported to the Sears, Roebuck parking lot where the body of Rhonda Bornstein was discovered. Upon being released on the evening of December 9, 1971, he was taken by his parents to the Massachusetts General Hospital and was admitted to and remained in the emergency ward from 8:05 p.m. until approximately 1:15 a.m. December 10, 1971. He was subsequently interrogated by police officers at the hospital commencing at 3:30 a.m. of the same morning and ending at approximately 7:30 a.m. During the latter portion of this hospital interrogation, the petitioner again uttered incriminating statements.

The trial court suppressed all statements made by the petitioner from the time of his abduction on December 8,

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until 4:15 p.m. on December 9, 1971 on the ground of involuntariness, but ruled admissible all of his immediately subsequent statements and conduct on that day, leading to the discovery of the body of Rhonda Bornstein. In so doing, the court found that all of the petitioner's conduct subsequent to 4:15 p.m. was voluntary and not the "fruits of the poisonous tree." The petitioner's hospital statements of December 10, 1971 were suppressed on the ground that his right to counsel had been intentionally denied by police interrogators, but were found to have been voluntarily made, thereby permitting their use for impeachment purposes under *Harris* v. *New York,* 401 U.S. 222, 91 S. Ct. 643; 28 L. Ed. 2d 1 (1971).

Reasons for Granting the Writ.

I. THE INCRIMINATING STATEMENTS AND ACTIONS OF THE PETITIONER MADE TO HIS KIDNAPPERS WHILE STILL IN THEIR GRIP WERE INVOLUNTARY AND THEIR ADMISSION INTO EVIDENCE VIOLATED THE PETITIONER'S RIGHTS UNDER THE FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS.

The trial court suppressed only that part of petitioner's conduct, during the period of his abduction, which occurred prior to 4:15 p.m. on December 9, 1971. In its pretrial findings of fact relevant thereto, the trial court found the following:

1. From September 15, 1970, the date of his daughter's disappearance, Mr. Bornstein "had the volunteered assistance of the 'concerned group' and entered upon a consistent and persistent and harassing course of conduct towards the [petitioner] . . . up to and including the events of December 8, 1971 . . . . This evidenced itself almost immediately by some of the 'concerned group'

forcibly restraining Mahnke at Northeastern University, where he was a student, in broad daylight and seeking to isolate him and interrogate him'' (A. 71).

2. ''There was another occasion when the 'concerned group' or some of them again visited Northeastern University and again attempted to isolate and detain him. Mahnke was deeply conscious of the fact that he was being followed by this group, and on this occasion he broke away and ran to a police patrol cruiser which was in the neighborhood'' (A. 71).

3. ''At very frequent instances during this fifteen-month period one or more of the 'concerned group' would park a car in the area of Mahnke's house and proceed to follow him. On many of these instances I find that Mahnke knew he was in fact being followed'' (A. 71).

4. Ferreri and Fontacchio, on August 17, 1971, visited the petitioner's place of employment (Henry F. Bryant & Son, Inc.) for the purpose of interrogating him. When the petitioner saw them he ''immediately became frightened and turned and ran and Ferreri and Fontacchio made an effort to follow him. They were stopped by the receptionist who indicated that she was going to call the police, and they thereupon left Bryant's . . .'' (A. 72).

5. On December 22, 1970, the petitioner's then attorney, William Bulger, arranged for the petitioner to be interviewed, at his office, by Detective Gawlinski. Mr. Bornstein learned that this interview was to take place resulting in Campbell and Fontacchio's conducting a surveillance of attorney Bulger's office ''for at least the purpose of following him when he (Mahnke) left the office, and in view of their prior conduct it is a fair inference that they intended to again try to stop him and question him'' (A. 72). Having been advised by attorney Bulger's secretary that Mahnke was not present, they left the office

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and resumed their purpose of surveillance following the petitioner when he left after the interview but losing him in existing traffic. Either Campbell or Fontacchio was equipped, at this time, with a two-way walkie-talkie (A. 72).

6. When the abduction at Mt. Ida commenced at approximately 7:30 p.m. on December 8, 1971, the petitioner struggled in an effort to escape "and Ferreri hit him a vicious and punishing blow in the area of his left eye. It subsequently became inflamed, swollen, black and blue, and caused great discomfort. Mahnke's eyesight is such that he wears very strong prescription glasses at all times and has poor vision without glasses. When he was struck, he fell to the ground and lost his glasses." The petitioner never regained possession of these glasses at any time prior to at least December 10, 1971 (A. 73).

7. When the petitioner began to scream in order to attract attention, Mr. Bornstein, who was at the scene, revved up the engine of Ferreri's motor vehicle for the purpose of distracting the attention of a special police officer whom he knew to be in the vicinity, and was successful in so doing. Simultaneously, the petitioner was grabbed by Fontacchio, "a big, strong, rough, husky adult" and by Ferreri, and forced into Mr. Bornstein's motor vehicle driven by Fisher. He was pushed head first into the automobile continuing to yell and scream all the time. Once inside the car, Ferreri had a headlock on the petitioner and tilted his head onto his lap, while Fontacchio still had him by the left arm. He was placed in such a position that his head was below the level of the front seat (A. 74).

8. As Fisher drove away from the Mt. Ida campus the petitioner wrenched himself loose from the grasp of

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both Ferreri and Fontacchio and as he attempted to grab Fisher around the neck from behind, he was quickly and forcibly subdued (A. 74).

9. During the drive to the cabin, the petitioner remained in virtually the same position in the continued grasp of both Ferreri and Fontacchio. "[T]he combination of shock, fear, and injury from which Mahnke was then suffering rendered him in a physical state where resistance was not possible to him and any attempt at escape would have been completely fruitless." During this time, the petitioner was bleeding fairly heavily from the face (A. 75).

10. At approximately 11:30 p.m. Ferreri and Fontacchio left the cabin leaving the petitioner in the custody of Fisher who had "obtained a bread knife approximately twelve inches long which he exhibited to Mahnke and made sure that Mahnke knew he had it" (A. 78).

11. During the period of time in which he was left alone with Fisher, the petitioner was "an extremely scared and terrified young man and didn't need any threats to keep him subdued" (A. 78).

12. At approximately 6 a.m., December 9, 1971, Ferreri and Campbell arrived at the cabin, joining Fisher, and for the next four hours "the three of them relentlessly interrogated Mahnke concerning his knowledge of the whereabouts of Rhonda Bornstein" (A. 79).

13. This interrogation was "interspersed with threats to Mahnke's life and the language used was extremely rough. If it was intended to intimidate Mahnke, it had the desired effect. I find that Mahnke was terrified, scared to death, uncertain as to whether or not they intended to kill him, and, coupled with his physical injuries and a splitting headache, nothing that he said or did could under any circumstances be considered by anybody to be voluntary" (A. 79).

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14. At 10 a.m. on December 9, 1971, the group at the cabin was augmented by the arrival of Fontacchio and Heard. Confronted with these five persons, "[f]rom approximately 10 a.m. until 12 noon Mahnke was again subjected to a harassing, threatening, profane, and insistent interrogation. The threats were threats not only of physical injury to him but threats to take his life—'that he would never leave there alive.' During the entire period of time, Mahnke was completely terrified, in fear, and thoroughly subdued" (A. 80).

15. Subsequent to the brief appearance at the cabin by Chief David Tyler, the petitioner "was then subjected to the same type of grilling, threatening, harassing, insistent interrogation that had existed prior thereto until about 12:30 p.m." (A. 81).

16. Even after the petitioner (allegedly at his own request) was left alone in the "detention" room with Ferreri and Campbell, the petitioner continued, initially, to refuse to divulge any information about Rhonda Bornstein (A. 81).

17. In completely excluding any and all statements made by the petitioner prior to the departure from the cabin at 4:15 p.m., the trial court found that such statements "were involuntary and induced by threats, duress, intimidation, fear, and at least some violence (the original striking of the defendant at Mt. Ida)" (A. 83).

18. Most significantly, the petitioner's captors "decided to keep physical control of him until such time as he had showed them where the body of Rhonda Bornstein was buried" (A. 127). "[T]he first time he was free to leave with the acquiescence of the group who had originally kidnapped him was between 6:30 p.m. and 7 p.m. on December 9 when Ferreri asked Mahnke how he wanted to get home just prior to driving him home" (A. 94).

The trial court further held that "in view of the intolerable circumstances under which the statements by Mahnke were made at the cabin in Worthington and the inherent unreliability of statements coerced by violence and duress, I suppress the statements there made because I am unable to rationalize a legal philosophy making them admissible and not at the same time violating Mahnke's constitutional basic rights" (A. 110). " '[I]n light of the totality of the circumstances, the will of the defendant had been overborne so that the statement was not his free and voluntary act' " (A. 112).

Despite the unequivocal and commanding language of the trial court, as hereinabove set forth, the petitioner submits the following additional evidence, adduced at the pre-trial hearing, further emphasizing the degree of coercion exercised upon him prior to the time at which the trial court found a "change of attitude" on the part of the petitioner:

1. The frame of mind of the five kidnappers was such that they were going to keep Mahnke in the cabin until they decided he could leave (Fisher—Tr. 169).[2]

2. When the petitioner and his abductors first arrived in the cabin the temperature was below freezing (Fisher—Tr. 93), and this temperature remained constant until approximately 11 p.m., December 8, 1971 (Tr. 108).

3. During the interrogation of the petitioner on December 9, 1971, he was complaining about his face and eye (Fisher—Tr. 117).

4. During the ride from Mt. Ida to the cabin, blood was on the petitioner's face and staining his coat (Ferreri— Tr. 288).

5. The purpose of constantly following the petitioner was to determine a pattern of his movements (Ferreri—Tr. 348), and also to set up an opportunity to question

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[2] "Tr." refers to pages in the original trial transcript.

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him (Tr. 349). The petitioner was also followed for determining his school and work habits (Ferreri—Tr. 372).

6. At the cabin the petitioner stated that he could not see without his glasses which he was without (Ferreri—Tr. 383). At no time did anyone tell the petitioner at the cabin that he was free to leave or go wherever he wanted to go (Ferreri—Tr. 391 and 406).

7. During the ride from Mt. Ida to the cabin the petitioner kept saying, "What did I do? You don't know me. I don't know you." He received no response (Fontacchio—Tr. 700). When the group alighted from the motor vehicle upon their initial arrival at the cabin, the petitioner tripped in the snow and said that he couldn't see (Fontacchio—Tr. 733).

8. When the petitioner first arrived at the cabin his eye was "pretty swollen" and there was blood on his face and nose (Fontacchio—Tr. 742, 745).

9. Fontacchio had volunteered his services to the Bornsteins "for whatever purpose his services could be used" (Tr. 807).

10. Between 6:30 and 7:30 a.m. on December 9, 1971, the petitioner was "asleep or unconscious" (Campbell—Tr. 978).

11. Heard had conducted surveillance of the petitioner at Northeastern University "many times" (Tr. 1071) and had conducted surveillance of the petitioner's residence some two dozen times, some of which instances constituted full-day surveillances (Tr. 1108).

12. The trial court received testimony from Ralph Jacobs and Richard Jacobs, brothers, who were co-employees of the petitioner at Henry F. Bryant & Son, Inc. on August 17, 1971. This was the occasion upon which Ferreri and Fontacchio entered said premises for the purpose of seeing the petitioner. Their testimony is reflected at Tr. 1283 through 1295, and is similar, if not

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identical, as to what actually transpired on that date. According to their testimony, when Ferreri and Fontacchio asked to speak with the petitioner, he was summoned and a scuffle ensued. The petitioner was heard to yell "Joe, Joe," obviously seeking help of another co-employee. The petitioner thereupon broke away from Ferreri and Fontacchio and appeared "with his hair messed and his glasses cocked." When Joe, the petitioner's co-employee, asked Ferreri and Fontacchio to leave, one of them "pushed his coat back and put his hand on his hip where there was an object." Although concealed, it was a long object resembling a stick or a knife. As they were leaving, either Ferreri or Fontacchio said to the petitioner, "George, we know what you did and you are going to pay for it—we will get you." It is significant to note that in its reference to this incident, the trial court made no finding whatsoever of a threat, a scuffle and a long concealed object strapped to the hip of one of the intruders.

13. There was an abortive attempt to kidnap petitioner in November of 1970 at Northeastern University by Mr. Bornstein and two others (Bornstein—Tr. 1876).

14. For a period of months, groups acting on behalf of Mr. Bornstein followed the petitioner from the time he left his house in the morning until the time he returned at night. This time period included both petitioner's school term and vacation (Bornstein—Tr. 1918).

15. On one occasion, Mr. Bornstein's son, Jordan, went to Northeastern University and "grabbed the [petitioner] and walked him out to the street." The petitioner kept saying he didn't know why he was being grabbed and pushed and questioned (Bornstein—Tr. 1920-1921).

16. It had been Mr. Bornstein's intention to "take" the petitioner and "keep him" until he heard answers he wanted to hear. In fact, prior to December 8, 1971,

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there had been other attempts to kidnap the petitioner, which attempts had failed (Bornstein—Tr. 1938).

The ruling of the trial court admitting all conduct of the petitioner subsequent to 4:15 p.m. on December 9, 1971, was predicated upon a finding that the relationship between the petitioner and his abductors, particularly Ferreri, had "warmed considerably" (A. 81). It was also concluded that after the statements made by the petitioner at approximately 2 p.m. on December 9, "all hostility on the part of the 'Worthington Five' stopped. There was no longer any intimidation, threats, or force. Mahnke's conduct towards the group became voluntary and cooperative" (A. 83).

Nevertheless, the trial court stated: "It is difficult to understand from the evidence why a rapport or relationship of some degree of confidence and friendliness arose between Ferreri and Mahnke at this point. [12:30 p.m., December 9, 1971.] It may be that Mahnke picked out the least of all evils to be his confidant" (Ferreri A. 81).

The petitioner submits that this finding by the trial court of a sudden change of relationship between the petitioner and his kidnappers is not supported by the evidence and contends that the duress and coercion which rendered involuntary his conduct prior to 4:15 p.m. continued with this same effect up to and until the time of the petitioner's release at 7:30 p.m. all contrary to the "ultimate findings" of the trial court reflected at A. 95.

In support of his contention that his conduct remained involuntary subsequent to 4:15 p.m. and that no "spirit of cooperation and reliance and trust" existed prior thereto with regard to Ferreri (A. 95) the petitioner submits the following facts adduced at the pre-trial hearing:

1. As the group was leaving the cabin at 4:15 p.m., Ferreri said to the petitioner "you will *have* to tell me

where to go" (emphasis supplied) (Tr. 210). When the group arrived at the Sears, Roebuck parking lot in no way was the petitioner told that he was free to go (Fisher—Tr. 228).

2. When Ferreri returned from his initial fruitless search of the area beneath the tracks he commanded the petitioner to accompany him (Fisher—Tr. 237).

3. The petitioner refused to go because he was afraid the group was going to kill him (Fisher—Tr. 238, 252).

4. At the Sears, Roebuck parking lot at approximately 6 p.m. on December 9, 1971, the petitioner said "for God's sake would you please leave me alone" (Ferreri—Tr. 426).

5. During the petitioner's conversation with Campbell and Ferreri, at which point the trial court found a warming of their relationship, the petitioner "had a fear" that he "will never make it home" (Ferreri—Tr. 429).

6. Ferreri himself understood that the petitioner, at this time of alleged "confidence," felt that "he wasn't going to leave" (Tr. 431).

7. It was only after he was assured by Ferreri that he would "make it home," if he talked, did the petitioner commence to make incriminating statements (Tr. 430).

8. Before answering any questions, the petitioner made Ferreri promise that "those other kids wouldn't touch him" (Ferreri—Tr. 434).

9. When asked if he would have driven the petitioner home had he refused to answer questions, Ferreri answered "I don't know" (Tr. 445).

10. Even as the group left the cabin at 4:15 p.m., there was no assurance that they would receive from the petitioner the information they were seeking. (Ferreri—Tr. 445.)

11. During the drive from the cabin to Sears, Roebuck, the petitioner kept imploring Ferreri to "go fast, I want to lose them" (Ferreri—Tr. 457).

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12. Ferreri himself acknowledged that when he requested the petitioner to go with him to the tracks at Sears, Roebuck, the petitioner again exhibited a fear for his life by stating, "I'm scared you are going to kill me" (Tr. 481).

13. Before the petitioner made any incriminating statements at the cabin regarding Rhonda Bornstein, he stated to Ferreri "if you promise me that I will make it home, I will tell you." Ferreri so promised (Tr. 539).

14. Even when the petitioner expressed fear for his life at the Sears, Roebuck parking lot, Ferreri gave him no assurance of safety. He was only told that he would not be killed (Tr. 592).

15. When the group left the cabin at 4:15 p.m., in order to proceed to Boston, they doubted the truth of what the petitioner had told them, and, when asked whether the petitioner would have been killed had his information not checked out, Fontacchio answered unequivocally "no, I don't know what would have happened" (Tr. 830). Indeed, the petitioner was advised of the still existing threat to his safety, when, as the group departed for Boston at 4:15 p.m., he was told "look, we are going to give you a chance and take you with us" (Tr. 834).

16. At the Sears, Roebuck parking lot the petitioner "seemed pretty upset" (Fontacchio—Tr. 895).

17. During the 12:30 interrogation by Ferreri and Campbell, contrary to exhibiting a feeling of trust, the petitioner was "really emotional, frightened and sweating, he wasn't in complete balance" (Campbell—Tr. 1007).

18. When the group left the cabin at 4:15 p.m. and approached Chief Tyler and his companion, Reno Liimatainen, who was holding the shotgun, Chief Tyler saw two persons separate from the group and go to the GTO automobile. Thus, prior to the threatening statement of

Liimatainen, the petitioner and Ferreri "broke away" from the group, with the remaining five, according to Chief Tyler, coming "close to me" (Tr. 1201).

19. Immediately prior to the group's departure from the cabin at 4:15 p.m., Mr. Liimatainen heard "pounding noises" coming from the cabin (Tr. 1262).

20. Mr. Liimatainen also testified that he stated "any funny business, I will blow your guts out," *after* the petitioner and Ferreri had broken off from the group and were making their way to the GTO automobile. "They [Ferreri and the petitioner] looked kind of scared" (Tr. 1264-1280).

The question of whether the due process clause of the Fourteenth Amendment has been violated by admission into evidence of a coerced statement is the subject, upon appellate review, of an independent determination. *Ashcraft* v. *Tennessee,* 322 U.S. 143; 64 S. Ct. 921; 88 L. Ed. 1192 (1944).

The true test of voluntariness is whether the statement was made freely and without compulsion or inducement of any sort. *Haynes* v. *Washington,* 373 U.S. 503; 83 S. Ct. 1336; 10 L. Ed. 2d 513 (1963). The voluntariness doctrine in state cases encompasses all interrogation practices which are likely to exert such pressure upon an individual so as to disable him from making a free and rational choice. *Miranda* v. *Arizona,* 384 U.S. 436; 86 S. Ct. 1602; 16 L. Ed. 2d 694 (1966). The question must be resolved in the light of the totality of the circumstances. *Procunier* v. *Atchley,* 400 U.S. 446; 91 S. Ct. 485; 27 L. Ed. 2d 524 (1971). A confession extorted by mental coercion is as involuntary as one extorted by violence or threats of violence. *Gladden* v. *Holland,* 366 F. 2d 580 (9th Cir. 1966).

The admissibility of "self-implicating statements" is to be judged by the standards of admissibility applicable

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to a confession where constitutional principles are involved. *United States* v. *Robinson,* 439 F. 2d 553 (D.C. Cir. 1970) (rehearing den. 1971). When circumstances presented for review involve two incriminating statements, the former being ruled involuntary, the admissibility of the latter depends upon the same test—is it voluntary? The fact that the earlier statement was obtained by coercion is to be considered in appraising the character of the later confession. The effect of the earlier abuse may be so clear as to forbid any other inference than that it dominated the mind of the utterer to such an extent that the later statement is involuntary.

Where the relationship between an earlier and admitted involuntary statement and a subsequent statement is so close that one must say the facts of one control the character of the other, the later statement is involuntary as a matter of law. *Leyra* v. *Denno,* 347 U.S. 556; 74 S. Ct. 716; 98 L. Ed. 948 (1954). In *Leyra,* both incriminating statements were extracted within a period of approximately five hours and *both were parts of one continuous process.* In the instant case, Fontacchio, one of the abductors, himself described the kidnapping from the abduction at Mt. Ida to the discovery of the body at Sears, Roebuck as "one continuous event" (Tr. 628). The petitioner does not contend that a witness's testimony is necessarily controlling on this question but submits that this testimony corroborates the contention that the mental duress effectuated by the abduction continued until 7 p.m. on December 9, 1971 which was the first time the petitioner was free to leave with the acquiescence of the group who had originally kidnapped him (A. 94).

In *Clewis* v. *Texas,* 386 U.S. 707; 87 S. Ct. 1338; 18 L. Ed. 2d 423 (1967), in holding a third statement made by the defendant to have been involuntary, the Court,

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in determining the question, held that the facts relating to the third statement could not be separated from the circumstances surrounding the two earlier statements *when there was no break in the stream of events.* This criterion, the petitioner submits, is directly applicable to the instant factual situation.

The Court in *United States* v. *Bayer,* 331 U.S. 532; 67 S. Ct. 1394; 91 L. Ed. 1654 (1947), faced with the issue of admissibility of a second incriminating statement stated as follows (at page 540):

> "Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first."

In *Gladden* v. *Holland, supra,* the court, examining the totality of the circumstances, vitiated a plea of guilty entered subsequent to a confession found to be involuntary. The *Gladden* court noted that the guilty plea had been entered *within two or three hours* after the coerced confession had been given and analogized the problem to that presented when a second confession is claimed to be vitiated by an earlier coerced confession.

In *Gilpin* v. *United States,* 415 F. 2d 638 (5th Cir. 1969), where a first confession was ruled involuntary and a subsequent confession was obtained by officials armed with the earlier involuntary statement, the court held that the later confession was so closely connected with the former that it was not the product of a free and unfettered choice. The court determined the existence of a *causal relationship* between the earlier unconstitutional

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conduct and the later statement. *See also Harney* v. *United States,* 407 F. 2d 586 (5th Cir. 1969).

In *Beecher* v. *Alabama,* 389 U.S. 35; 88 S. Ct. 189; 19 L. Ed. 2d 35 (1967), an accused confessed under gunpoint at the time of his arrest. This was given significant weight in holding involuntary a statement given by the accused *five days later,* after being informed of his rights to remain silent and to representation by counsel, in view of the fact that during the five days the accused had been in custody in a prison infirmary undergoing treatment for a bullet wound in his leg. Is not this custody subsequent to an involuntary statement analogous to the perpetuation of the petitioner's abduction from 4:15 p.m. to 7:30 p.m. on December 9, 1971? *See also United States ex rel. Hughes* v. *McMann,* 405 F. 2d 773 (2d Cir. 1968).

The kidnapping of the petitioner commencing at 7:30 p.m. December 8, 1971, and terminating some 24 hours later was one continuous event. There was no break in the causal relationship between the occurrences prior and subsequent to 4:15 p.m. on December 9, 1971. Even the trial court found it "difficult to understand" (A. 81) why a relationship of confidence and friendliness arose between Ferreri and the petitioner. Why, of all people, would the petitioner designate Ferreri as a confidant, the same Ferreri who administered the only conceded violence to the petitioner at the time of his abduction from Mt. Ida and at whose back the petitioner "menacingly" held a knife? (A. 92.) If an individual is being beaten and/or threatened by his inquisitors, and as a result thereof his will is overcome, can his actions be deemed to be "voluntary"? The petitioner's lack of resistance, commencing in the afternoon of December 9, 1971 was the direct result of threats, duress, intimidation, fear and violence. Must someone who is thus victimized bear the burden of risking his life by attempting to escape at every possible opportunity and by continuing to resist ad infinitum? To answer this question affirmatively is to, in effect, forever obviate any set of circumstances under which an incriminating statement may be deemed involuntary. The inevitable conclusion thereof would be the promulgation of a doctrine wherein submission erases the legal effect of the coercion which caused it.

The trial court placed great emphasis on the petitioner's failure to cry out in the presence of Chief David Tyler and Reno Liimatainen as the group was leaving the cabin at 4:15 p.m. on December 9, 1971. He had, however, been subjected, immediately prior thereto, to kidnapping, threats, duress, intimidation, fear, and violence, all of which had culminated a 15 month period of both mental and physical harassment. There was no evidence to the effect that the petitioner knew that David Tyler was the chief of police. If he actually saw Mr. Liimatainen pointing the shotgun why must it have been necessary for him to determine whether he was in the presence of friend or foe? The testimony of both Tyler and Liimatainen reflects that as they were approached by the group emerging from the cabin, two individuals "broke off" from the group and were heading towards the GTO automobile. Could not have Ferreri been "escorting" the petitioner to the motor vehicle for the specific purpose of preventing his outcry? The sketch attached to the record by the trial court (A. 86) itself reflects that the petitioner was farthest from Liimatainen at the time of the conversation between Fisher and Tyler. The petitioner was without his glasses, but, assuming arguendo, that he actually saw Mr. Liimatainen with the shotgun, did the survival of his constitutional rights, under all of

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the circumstances, depend upon whether or not he attempted an escape, the success of which can only be speculative?

Similarly, the trial court attached great significance to the petitioner's failure to yell or run away at the Sears, Roebuck parking lot at which other people were present. If these unaware Christmas shoppers were in such close proximity to the petitioner, why did not one of them observe Ferreri being followed by the petitioner openly and "menacingly" holding a knife? In this day and age, when it is not unusual for non-involved persons to stand idly by while a vicious assault or murder is being committed in their presence, should an escape obligation be imposed upon the petitioner, with the consequences of his non-compliance therewith being the attrition of his constitutional rights? Did not the presence of his five abductors constitute more of a controlling influence upon the petitioner than the proximity of strangers whose reaction, if any, can only be hypothesized? Having been kidnapped on a college campus, in the midst of college activities and in the presence of a special police officer, why should a Sears, Roebuck parking lot constitute a mandatory haven wherein continued submission to coercion is interpreted as voluntary conduct?

To conclude, with the benefit of hindsight, that the petitioner should have remained silent, attempted escape or consistently remained adamant to his five abductors, in no way takes into consideration the subjective effect of being kidnapped following a 15 month period of harassment, as is present in the instant case. What a reasonable man should do under the existing circumstances, as distinguished from that which he hypothetically might have done, should be the standard for determining the voluntariness or lack thereof with regard to his conduct.

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Surely, the petitioner should not be deprived of his constitutional rights because he fervently desired the sanctuary of his home. The alleged fact that Ferreri "trusted" the petitioner reflects only the former's state of mind. To succumb to brutality is the complete antithesis of voluntary action.

Thus, the petitioner respectfully submits that all of the coercion found to have existed by the trial court prior to 4:15 p.m. continued and indeed caused the adherence of the petitioner to his captors' demands.

It can not be said that the petitioner was not *compelled* to utter statements and engage in conduct when but for the improper influence exerted upon him he would have remained silent. *Bram* v. *United States,* 168 U.S. 532; 18 S. Ct. 183; 42 L. Ed. 568 (1897).

II. THE INCRIMINATING STATEMENTS AND ACTIONS OF THE PETITIONER SUBSEQUENT TO 4:15 P.M. ON DECEMBER 9, 1971, WERE EXCLUDABLE AS "FRUITS OF THE POISONOUS TREE" AND/OR UNDER THE "CAT OUT OF THE BAG" DOCTRINE, AS THE DIRECT PRODUCTS OF THE EARLIER COERCED STATEMENTS.

The trial court, in rejecting the application of the "fruit of the poisonous tree" doctrine stated: "I can find no case which has ever held that the 'poisoned fruits' doctrine is applicable to private persons" (A. 114). Although it has been held that the Fourth Amendment, as it pertains to the protection against unreasonable searches and seizures, was intended only as a restraint on the activities of sovereign authorities (*Burdeau* v. *McDowell,* 256 U.S. 465; 41 S. Ct. 574; 65 L. Ed. 1048 (1921)), the petitioner submits that any analogy thereto, when dealing with *involuntary statements,* should not be well taken;

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for involuntary statements to private individuals are inadmissible *per se,* without the necessity of those effecting the coercion being state or federal officers. Thus, involuntary statements given to private individuals, *inadmissible ab initio,* should be embraced by the extension of the "fruit of the poisonous tree" doctrine; and, indeed, by way of converse response to the trial court, the petitioner submits that there exists no case ruling negatively upon this proposition. The need to protect personal security from private as well as public invasion is certainly an important factor, and the controlling matter is the unfairness of the use of evidence improperly obtained by private individuals and the degrading of the judicial system that must necessarily accompany that use. Common sense supports such a conclusion.

Alternatively, the trial court found that the discovery of the body near Sears, Roebuck was not a "fruit" of the original involuntary statement since this evidence "did not flow from this statement," and that "the connection between the illegality and the evidence offered is so attenuated as to dissipate the taint" (A. 115). The trial court, in so holding, cited *Nardone* v. *United States,* 308 U.S. 338; 60 S. Ct. 266; 84 L. Ed. 307 (1939), but that case, however, did not address itself to the question of what attenuation would be sufficient to dissipate the taint of the initial illegality. Moreover, the *Nardone* Court held that the statute prohibiting the unauthorized publication of out-of-state or foreign communications by wire or radio did not merely interdict the introduction into evidence in a federal trial of the intercepted telephone conversations and therefore leave the prosecution free to make every other derivative use of the proscribed evidence. The *Nardone* Court reversed, holding that the trial judge had improperly refused to allow the accused to

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examine the prosecution as to the uses to which it had put the illegally obtained information.

A distinct standard was provided in *Wong Sun* v. *United States,* 371 U.S. 471; 83 S. Ct. 407; 9 L. Ed. 2d 441 (1963) in which the Court stated (at page 488):

> "[T]he more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' "

The issue was again formulated in *Harrison* v. *United States,* 392 U.S. 219; 88 S. Ct. 2008; 20 L. Ed. 2d 1047 (1968). Therein, the prosecution introduced three confessions of the defendant. The defendant then took the stand and gave his version of the crime which placed him at the scene of the crime with the murder weapon but attributed his presence to a lawful purpose and the discharge of the gun to accidental causes. Harrison was convicted, but on appeal the conviction was reversed on the ground that the confessions were erroneously admitted. At a subsequent trial, the prosecution introduced Harrison's testimony at the prior trial. The Supreme Court reversed, holding that the trial testimony was the fruit of the inadmissible confession and therefore subject to exclusion. Responding to the argument that the tactical decision to testify attenuated the taint, the Court simply replied that "the question is not *whether* [Harrison] made a knowing decision to testify, but *why*" (*Harrison* at 223). "Having [used] the petitioner's unlawfully obtained confessions against him, the Government must show that its illegal action did not induce his testimony" (*Harrison* at 225). If illegally obtained evidence leads to the dis-

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covery of subsequent evidence, there exists a taint caused by the initial illegality. See *United States* v. *Schipani,* 289 F. Supp. 43 (E.D. N.Y. 1968) *affd.* 414 F. 2d 1262 (2d Cir. 1969).

In *Wong Sun, supra,* the defendant had been taken into custody under circumstances which the Court found to constitute an improper arrest. He was, however, released on his own recognizance. He returned "voluntarily" several days later for interrogation. During that interrogation, he made incriminating oral statements. The *Wong Sun* Court's finding of sufficient attenuation to dissipate the taint was predicated upon *the period of freedom enjoyed by the defendant between the initial illegality and the subsequent incriminating statements.* No such break in the chain of events exists in the instant case.

In *Fisher* v. *Scafati,* 439 F. 2d 307 (1st Cir. 1971), a written confession was preceded by an illegally obtained oral confession, and all that intervened between the two confessions was a full warning of right to counsel and right to remain silent, which warnings did not inform the defendant that the oral confession was invalid and could not be used against him. The court assumed that the initial illegal oral confession could have led the defendant to a belief that he was trapped, noting that the defendant had "proceeded gradually into a state of inescapable involvement," and excluded the second written confession as having been tainted by the first. *See also Gladden* v. *Holland, supra,* at 584.

In *United States ex rel. Townsend* v. *Twomey,* 322 F. Supp. 158 (N.D. Ill. 1971) the defendant's confession to murder was ruled involuntary. In said confession he gave information which led to the finding of the victim's wallet, where he said he threw it. The court excluded the wallet stating that its use "contravenes the long established doctrine against using fruit of the poisonous tree" (*Townsend,* at 177).

In *United States* v. *Killough,* 218 F. Supp. 339 (D. D.C. 1963), the court found a dissipation of the taint since after giving an inadmissible confession to the police the defendant *was afforded adequate time for deliberate reflection* prior to making a subsequent incriminating statement *which was in no way effected by coercion or other improper inducement.* Such facts, giving rise to taint dissipation, are completely absent in the instant case. It is interesting to note that upon appeal, the United States Court of Appeals for the District of Columbia Circuit reversed, ruling that the second incriminating statement was inadmissible since it was made to a "classification intern" at the District of Columbia jail and the defendant had not been advised that it would not be used against him and where, had he made such inquiry, he would have received a promise that his statements would not be used against him. *Killough* v. *United States,* 336 F. 2d 929 (D.C. Cir. 1964).

The facts of the instant case in no way establish that the alleged "fruits" would have been discovered even had the original illegality not occurred. On the contrary, there is an unequivocal and inescapable "but for" causal relationship between the occurrences prior and subsequent to 4:15 p.m. December 9, 1971. In addition to emphasizing this direct causal relationship, the petitioner respectfully submits that the exclusionary "fruit of the poisonous tree" rule, especially in the context of the instant case, is required for reasons independent of its effectiveness in deterring the underlying invasion of personal rights. Reliance by courts on evidence obtained by such means may well violate a public "sense of fairness," thereby decreasing respect for the judicial system and ultimately working to its disadvantage. There exists an inherent unfairness in the use of evidence obtained as in

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the instant case to the detriment of the one whose rights are violated, without regard to the effectiveness of exclusion on the protection of these same constitutional rights.

Thus the petitioner submits that all of his conduct subsequent to 4:15 p.m. "flowed" from all that had transpired prior thereto and constitutes a classic example of "fruits of the poisonous tree."

III. THE STATEMENTS OF THE PETITIONER MADE TO POLICE OFFICERS AT THE MASSACHUSETTS GENERAL HOSPITAL ON DECEMBER 10, 1971, SHOULD HAVE BEEN SUPPRESSED FOR ALL PURPOSES BECAUSE (A) THEY WERE INVOLUNTARY OR (B) THEY WERE NOT EMBRACED BY HARRIS v. NEW YORK, SUPRA, HAVING BEEN ELICITED AS A RESULT OF INTENTIONAL POLICE MISCONDUCT.

The trial court suppressed the statements complained of for purposes of the Commonwealth's case-in-chief but allowed their potential use for the limited purpose of impeachment, all under the decision of *Harris* v. *New York*, 401 U.S. 222; 91 S. Ct. 643; 28 L. Ed. 2d 1 (1971).

A. *The petitioner's first contention is that these statements were made involuntarily and should have been suppressed for any purpose whatsoever.*

The pre-trial testimony of Police Officer Francis Sheehan, one of the interrogators on the day in question revealed the following:

1. When he and Sgt. Daley introduced themselves to the petitioner and told him that they were there as a result of a body being found earlier that evening in the area of Sears, Roebuck, the petitioner did not answer (Tr. 1977).

2. The interrogation commenced in a hospital room and the petitioner was subsequently wheeled out in his bed to the hospital corridor (Tr. 1978).

3. The petitioner advised that he "did not want to talk about it" and when questioned would answer "I want to talk to my parents" (Tr. 1978).

4. During *the first hour* of interrogation, the petitioner said nothing, and would not respond to police questions (Tr. 1995).

5. Some questions were met with a delayed answer and others by complete silence (Tr. 1995).

6. So intense was the interrogation that the police officers were told by a hospital nurse that they were disturbing other patients (Tr. 1996).

7. The questioning of the petitioner in the hospital corridor continued for approximately 45 minutes before he was moved into a second hospital room. No incriminating statements were made by the petitioner while he was in his original room or while he was in the hospital corridor (Tr. 2000).

8. Although the police officers received permission from the nurse to interrogate the petitioner, they did not indicate to the nurse the extent of their investigation (Tr. 2003).

9. When the nurse received telephonic permission from a physician for the police officers to interrogate the petitioner, she was given no information to relay to the doctor, to whom her request was addressed, regarding the purpose or seriousness of their visit with the petitioner (Tr. 2005).

10. At the time of the interrogation Officer Sheehan knew that the petitioner had just been abducted and had received a beating (Tr. 2008).

11. The petitioner's eye was swollen to the extent that the pupil could not be seen (Tr. 2011).

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12. When the petitioner was shown the "*Miranda* card," his condition was such that, in order to read it, he had to bring it to within inches from his face (Tr. 2012).

13. With regard to the incriminating statements obtained from the petitioner, "It was difficult there to get it out of him. You know, it was very slow" (Tr. 2031).

Sgt. John J. Daley, who also interrogated the petitioner on December 10, 1971, testified to the following:

1. During the course of the entire interrogation no signed statement was obtained by the officers (Tr. 2217).

2. The *first* question put to the petitioner was, "George, do you want to tell us what happened? Were you with the girl that night?" The petitioner's answer was "Where are my parents?" (Tr. 2221.)

3. When the petitioner made this first request regarding the whereabouts of his parents, the police response was, "They are home, I assume. This is your decision. You are 21 now and it's entirely your decision. Were you with the girl that night?" The petitioner did not answer (Tr. 2221).

4. During the interrogation of the petitioner in the first hospital room and subsequently in the corridor, he indicated that he wanted his parents present before any questions were asked; he did not willingly and freely volunteer any information (Tr. 2224).

5. At no time did the petitioner say, even in substance, that he was voluntarily making a statement knowing he didn't have to if he didn't want to (Tr. 2225).

6. The police officers were not confronted with a situation where the petitioner's conduct was such that they could say with intelligence that he waived his rights to *remain silent* (Tr. 2225).

7. The petitioner's manner of speech was "halting" at times (Tr. 2231).

8. After being advised of his *Miranda* rights, the petitioner asked for his parents "several times" (Tr. 2234).

Even prior to *Miranda*, the test of voluntariness was to examine the totality of the circumstances to determine if the confession or admission was voluntarily made, i.e., the failure to grant the accused access to outside assistance, including but not limited to his right to counsel. *Carter* v. *Eyman*, 281 F. Supp. 776 (D. Ariz. 1968). A failure to warn an accused person of his right to counsel or to grant him access to outside assistance are factors tending to prove the involuntariness of the resulting confession. *Johnson* v. *New Jersey*, 384 U.S. 719; 86 S. Ct. 1772; 16 L. Ed. 2d 882 (1966). The denial of counsel to a defendant at the outset of interrogation is a significant factor in considering the voluntariness of the statements later made. *Davis* v. *North Carolina*, 384 U.S. 737; 86 S. Ct. 1761; 16 L. Ed. 2d 895 (1966). The actions of police in denying an accused his right to counsel is to be considered in determining whether a suspect's statement was made in the unfettered exercise of his own will. *Commonwealth* v. *Kleciak*, 350 Mass. 679, 216 N.E. 2d 417 (1966).

In *Haynes* v. *Washington, supra,* the United States Supreme Court held that a defendant's written confession was *involuntary* and inadmissible where it was made while the defendant was held by the police incommunicado and after he was told by police officers that he could not communicate by telephone with his wife, until he made a written confession. The attending circumstances in *Haynes,* where the defendant at first resisted making a statement and gave in only after consistent denials of his requests to call his wife, and the effectuation of such outside contact being contingent upon his accession to police demands is, the petitioner contends, analogous to the situation at the Massachusetts General Hospital.

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The petitioner was released by his kidnappers at 7:30 p.m. on December 9, 1971. Within 30 minutes thereafter he was at the Massachusetts General Hospital where he remained until 3:30 a.m. the following morning, at which time his interrogation commenced. With his kidnapping experience as a subjective background, combined with what must have been emotional and physical fatigue, his initial refusal to respond to questions, his several denied requests to see his parents, the deliberate police circumvention of his right to his attorney, his being shuffled from hospital room to corridor back to hospital room, all support a finding of involuntariness. He was subjected to "an extensive interrogation" (A. 119). The fact that the petitioner answered some questions in a "halting" manner and declined to answer others is more consistent with the trait of involuntariness than with the "cagey and calculated manner" found by the trial court (A. 109). Accordingly, the petitioner submits that all statements of December 10, 1971, were involuntarily made and should have been suppressed for impeachment purposes as well as case-in-chief presentation.

B. *The petitioner alternatively submits that the December 10, 1971 incident is not embraced by Harris. Neither the United States Supreme Court decision nor the decision of the New York Court of Appeals, People* v. *Harris, 25 N.Y. 2d 175, 250 N.E. 2d 349 (1969) reflect a detailed factual account of the Harris case. Such an account, however, can be found in the initial appellate decision by the New York Supreme Court, 298 N.Y.S. 2d 245, 31 A.D. 2d 828 (App. Div., 2d Dept. 1969).*

The facts were as follows: subsequent to arrest the defendant was apprised of his privilege to remain silent and that anything he said might be used against him.

He was then questioned, but prior to making any admissions, he said he would like to speak to an attorney. The assistant district attorney brought the questioning to a close, told the defendant he had a right to counsel, and asked him if he desired to speak to an attorney then. The defendant replied that he would "call tomorrow." He asked what the charges against him were, and upon being informed, volunteered the information that everybody in his area was selling narcotics. After this statement, the assistant district attorney posed a few questions which defendant answered. *The defendant said his answers were voluntary and it was his decision to talk after requesting counsel.*

No mention of these facts is reflected in the United States Supreme Court decision. The violation of *Miranda* is merely described by the statement that no warning of a right to appointed counsel was given prior to the interrogation. The petitioner, therefore, submits that the *Harris* decision must be interpreted in the light of the actual *Harris* facts, i.e., a most technical violation of *Miranda* accompanied by the defendant specifically stating that his answers were voluntary.

Such is not the instant case, for here the trial court found that the conduct of the police officers, in interrogating the petitioner, was a deliberate course of conduct calculated to circumvent the petitioner's constitutional rights to have the benefit, aid, and counsel of his attorney (A. 108). Detective Gawlinski's presence at the hospital but his absence at the locus of interrogation was found by the trial court to be deception and circumvention (A. 119-120). The petitioner contends that the *Harris* doctrine was not intended to embrace intentional police misconduct, as distinguished from a technical violation of *Miranda*.

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Indeed, the United States Supreme Court has not extended the *Harris* doctrine to cases involving intentional police misconduct nor has it been presented with such a case. See *Bryant* v. *North Carolina,* 409 U.S. 995; 93 S. Ct. 329; 34 L. Ed. 2d 259 (1972) (defendant testified at a rape trial and denied using force; police officers thereafter testified to an admission of force made by the defendant without prior *Miranda* warnings); *Riddell* v. *Rhay,* 92 S. Ct. 337; 30 L. Ed. 2d 291 (1971) (wherein the defendant, charged with assault, testified and denied having the necessary intent whereupon he was impeached by police testimony of his admission of intent uttered in the absence of *Miranda* warnings).

If the *Harris* decision were to be extended to cases involving deliberate police circumvention of constitutional rights, an unreasonable burden would be imposed upon an accused's right to testify in his own behalf. Although, as the majority in *Harris* pointed out, a criminal defendant who seeks to testify cannot demand immunity from all impeachment, the propriety of permitting impeachment of a specific kind must be a matter of balancing the value of the impeaching evidence against the costs of its admission. Given the suspicion which a violation of constitutional rights, based upon deliberate police misconduct, casts upon the reliability of a statement, the probative value of the statement would seem to be outweighed by the costs of burdening a defendant's decision to testify, of diluting the deterrent impact of the exclusionary rule, and of aligning the courts with the lawless police interrogator.

By emphasizing the necessity of voluntariness as a condition precedent to evidentiary impeachment, the *Harris* Court in no way eroded the right to due process of law embodied by the Fifth and Fourteenth Amendments. Accordingly, the petitioner contends that *Harris* should not be interpreted as obviating the Sixth Amendment right to assistance of counsel effectuated by judicially determined intentional police misconduct.

Thus, for this reason as well, the petitioner contends that his right to testify in his own behalf should not have been impeded by the permitted use for impeachment purposes of his hospital statements of December 10, 1971.

Conclusion.

In declining to suppress the conduct of the petitioner from 4:15 p.m. to 7:30 p.m. on December 9, 1971, including but not limited to his conduct leading to the discovery of the body of the deceased, the trial court erred for the following reasons:

1. Under the "totality of the circumstances" (as hereinafter set forth) the coercive circumstances, as they affected the petitioner from September 15, 1970 to 4:15 p.m. on December 9, 1971, constituted such a flagrant degree of duress so as to render the petitioner's conduct, from the commencement to the termination of his abduction, involuntary and therefore inadmissible. These circumstances do not justify the "cut-off" time of 4:15 p.m. as constituting a cessation of that degree of terrorization which effectuated the petitioner's involuntariness. The kidnapping, in the context of the preceding 15 month period of constant harassment, physical and otherwise, was a complete and unbroken event in its entirety. Any change in behavior on the part of the petitioner was the direct result of the extreme pressure put to him and did not constitute, as the trial court found, a transformation in his relationship with the Worthington Five from "abductors" to "confidants." The involuntariness of the petitioner

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continued until his release at 7:30 p.m. on December 9, 1971. The coercion prior to 4:15 p.m. and the results thereof, permeated and caused the petitioner's conduct until he was physically set free. Accordingly, his "second confession" (his incriminating conduct from 4:15 p.m. to 7:30 p.m.) was so tainted by the immediate prior coercion so as to render his conduct involuntary and inadmissible.

2. The conduct of the petitioner from 4:15 p.m. to 7:30 p.m., being the direct result of what had immediately preceded it, was tainted under the "fruit of the poisonous tree" doctrine and was therefore inadmissible.

The statements by the petitioner to police officers at the Massachusetts General Hospital on December 10, 1971 should have been suppressed for any purpose whatsoever. The circumstances attending same are not embraced by *Harris* v. *New York, supra,* for in this instance the trial court found that the police officers did engage in a course of conduct *deliberately calculated* (A. 108) to circumvent the petitioner's constitutional rights to have the benefit, aid, and counsel of his attorney and that the conduct of Detective Gawlinski, who was present at the hospital, but remained downstairs during the petitioner's interrogation by other police officers amounted to "deception and circumvention" (A. 119). The petitioner contends, as more fully hereinafter set forth, that the facts of *Harris* and consequently the holding based thereupon, do not embrace intentional police misconduct as distinguished from a technical violation of the rights prescribed in *Miranda* v. *Arizona, supra.*

Moreover, the petitioner contends that his hospital statements were, in view of the "totality of the circumstances" involuntary (indeed, the trial court distinctly found no voluntary waiver of right to counsel by the pe-

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titioner) and, in addition, constituted "fruits of the poisonous tree," the taint coming from the illegal acts of private persons as hereinabove and hereinafter stated.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts.

Respectfully submitted,

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Supreme Court of the United States.

October Term, 1975.

GEORGE WAYNE MAHNKE,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

Appendix to the Petition for a Writ of Certiorari.

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Supreme Court of the United States.

OCTOBER TERM, 1975.

GEORGE WAYNE MAHNKE,
PETITIONER,
v.
COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

Appendix to the Petition for a Writ of Certiorari.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,
AT BOSTON, October 7, 1975.

IN THE CASE OF

COMMONWEALTH
VS.
GEORGE WAYNE MAHNKE

pending in the Superior Court for the County of Suffolk

ORDERED, that the following entry be made in the docket; viz.,—

The case is remanded to the Superior Court where the verdict of murder in the second degree and the sentence previously imposed are to be vacated. A verdict of guilty of manslaughter shall be entered and sentence shall be imposed thereon.

BY THE COURT,
Frederick J. Quinlan, CLERK.

October 7, 1975

COMMONWEALTH *vs.* GEORGE WAYNE MAHNKE.

Tauro, C.J. The events which frame the central issues in this case arise from legal and illegal efforts of the family and friends of a young woman (the victim) to provide an explanation for her mysterious disappearance in September of 1970. On December 9, 1971, her body was discovered in a shallow grave near the parking lot of a Sears, Roebuck and Co. (Sears) store in the Fenway area of Boston. The defendant, a boyfriend of the victim, was indicted for her murder in the first degree. Before trial, the defendant moved to suppress, inter alia,[1] (1) statements he had made on December 9, 1971, to members of a "concerned group" of citizens who had abducted, imprisoned and interrogated him, (2) certain evidence which had come to light through information contained in the aforementioned statements, and (3) a statement given to police from a hospital bed the following day. After a lengthy voir dire, the trial judge granted the defendant's motions in part and denied them in part. The defendant was convicted of murder in the second degree and was sentenced to life imprisonment.

In the present appeal, under G. L. c. 278, § § 33A-33G, the defendant argues four specific assignments of error, chiefly related to the refusal of the judge to exclude from the trial all evidence obtained as a result of his abduction and subsequent police interrogation. We delineate these assignments of error with more particularity below.[2] Other assignments of error, included in the defendant's "Assignment of Errors," have not been briefed or argued in this appeal and must be deemed waived. *Commonwealth* v. *Baker,* Mass.

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[1] We omit mention of motions to suppress which are not at issue in this appeal.

[2] See, however, n. 20, *infra*.

(1975),[a] and authorities cited. On January 8, 1975, by our order we directed the trial judge to make supplementary findings with respect to the voluntariness of the statements made by the defendant on December 9 and 10, 1971. These supplementary findings were duly filed on February 12, 1975, and on the defendant's motion, we allowed submission of further briefs directed to issues raised by the supplementary findings.

At the outset, we briefly summarize the subsidiary facts developed at the voir dire and reported in the careful and detailed initial and supplementary findings of the experienced trial judge.[3] We accept, as we must, the trial judge's resolution of conflicting testimony[4] (*Commonwealth* v. *Valcourt,* 333 Mass. 706, 710 [1956]; *Commonwealth* v. *Femino,* 352 Mass. 508, 513 [1967]; *Commonwealth* v. *D'Ambra,* 357 Mass. 260, 262-263 [1970]), and will not disturg his subsidiary findings if they are warranted by the evidence (see *Commonwealth* v. *Murphy,* 362 Mass. 542, 547 [1972]).[b] However, ultimate findings and conclusions of law, particularly those of constitutional dimensions, are open for our independent

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[a] Mass. Adv. Sh. (1975) 1875, 1877.

[3] On occasion, we refer to additional facts developed at the voir dire hearing.

[4] The judge chose to reject much of the testimony given by the defendant at voir dire and preferred contradictory testimony given by his captors. The judge was not required to believe the defendant's account. *Commonwealth* v. *Rogers,* 351 Mass. 522, 529 (1967), cert. den. 389 U. S. 991 (1967). *Commonwealth* v. *Femino,* 352 Mass. 508, 512 (1967). See *Commonwealth* v. *Forrester,* Mass. (1974) (Mass. Adv. Sh. [1974] 431, 437-438).

[b] Mass. Adv. Sh. (1972) 1679, 1683.

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review in this appeal.[5] *Id.* at 551[c] (Hennessey, J., concurring). See *Commonwealth* v. *Kleciak,* 350 Mass. 679, 685-689 (1966); *Commonwealth* v. *Cook,* 351 Mass. 231, 235 (1966), cert. den. 385 U. S. 981 (1966). Additional facts in the case are discussed below as they become relevant to the several issues of law being considered.

The Police Investigations. On September 16, 1970, the day following the victim's disappearance, her parents reported her disappearance to the Boston police, who immediately undertook an investigation. In the course of the early investigation, the defendant was twice interviewed by detectives from division 4 of the Boston police. The police did not suspect that a crime had been committed, but they did suspect that the victim was hiding somewhere in the Boston area and that the defendant had knowledge of where she was hiding, which he refused to divulge. Their suspicions were aroused by the several inconsistent stories which the defendant told in the September 16 interrogation regarding the events of the previous evening.[6] The second interview, held September 24 with the defendant's attorney present, had as its primary purpose a discussion of whether, and in what circumstances, the defendant might take a lie detector test. In fact, the defendant never took the test.

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[5] The scope of review by the United States Supreme Court is at least this broad. See, e.g., *Haynes* v. *Washington,* 373 U. S. 503, 515-516 (1963); *Davis* v. *North Carolina,* 384 U. S. 737, 741-742 (1966).

[c] Mass. Adv. Sh. (1972) at 1686.

[6] Initially, the defendant claimed that he and the victim had not met the night before as planned. Under further questioning, he admitted that he had seen her but said that he had left her at a ramp of the toll road to New York where, he said, she was going to have an abortion. When pressed further, he altered details of this story as well.

The police investigation continued, but failed to discover the cause of the victim's disappearance or her location. In early December, 1970, Detective Stanley Gawlinski (Gawlinski), attached to the office of the district attorney for Suffolk County, was assigned to the case on a full time basis. After repeated urging by the victim's father (the father) Gawlinski arranged a meeting with the defendant for December 22 in the law office of the defendant's attorney. The defendant, in the presence of his attorney, described his relationship with the victim and repeated the last story he had related to the police on September 16. In April, 1971, again at the father's suggestion, Gawlinski arranged to have Muddy River in the Fenway area dragged for the victim's body. When this search proved unavailing, Gawlinski conceded that he had exhausted his leads and consigned the case to the inactive file at the district attorney's office. Thereafter, Gawlinski maintained only sporadic contact with the victim's family and limited his investigations to leads which were supplied by interested persons. Even this limited contact ceased in August, 1971, after an unpleasant conversation in which he reprimanded the father for an attempt[7] by some young men to question the defendant at his place of work.

Private Efforts. Throughout the course of the police investigation, the father and his son were impatient with police investigations and unwilling to place sole reliance on them. The father worked with three private investigators and utilized the voluntary assistance of a large number (perhaps as many as 100) of family or neighborhood friends. Of these friends, a core group of the son's friends, styled the "concerned group" by the judge, were the most persistent workers. Included in the concerned group were Gary Fisher, James

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[7] This is described in somewhat greater detail at p. , *infra* (Mass. Adv. Sh. [1975] p.).

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Ferreri, Frank Fontacchio, John (Jay) Campbell and Joseph (Jay) Heard, participants in the abduction of the defendant.

The private efforts were principally[8] directed toward a program of surveillance designed to determine the pattern of the defendant's movements. Ultimately, the surveillance program was used to provide an opportunity to put questions to the defendant under conditions that would compel responses. There were a number of attempts to question the defendant. In September, 1970, before reporting the disappearance to the police, the father and son sought out the defendant on the campus of Northeastern University, where he was a student, questioned him, and took him on a tour of the Fenway district, in which, it could be supposed, the defendant met or was to have met the victim on the night of September 15. On two subsequent occasions, members of the concerned group accosted the defendant at Northeastern University and attempted, unsuccessfully, to detain him. In December, 1970, two members of the concerned group, Fontacchio and Campbell, appeared in the reception area of the office of the defendant's attorney while the meeting between the defendant and Gawlinski was in progress and inquired whether the defendant was within. They later followed the defendant and his mother. In August, 1971, Ferreri and Fontacchio were thwarted in an attempt to confront the defendant in the office of Henry F. Bryant & Son, Inc., where he was a summer employee.[9]

The Abduction. On December 8, 1971, the defendant drove to Mt. Ida Junior College in order to meet a young woman with whom he had a date. He arrived about 7:30 P.M. A surveillance group, consisting of the father, Fisher, Ferreri and Fontacchio, followed him in two cars. After the defendant had parked his car and entered a building, Ferreri and Fontacchio concealed themselves in heavy foliage near the defendant's car. When the defendant returned to his car, Ferreri emerged from the bushes, grabbed the defendant, and demanded to question him. As the defendant struggled to free himself, Ferreri, described as a "big, strong, husky youth," struck him near the left eye. The defendant fell and lost his glasses. Fontacchio approached and he and Ferreri guided the defendant into the back seat of an Oldsmobile. The father, who had moved from the Oldsmobile to the second car, raced the engine to divert attention from the defendant's calls for help. While Fisher drove the Oldsmobile, Ferreri maintained a headlock on the defendant so that his head was below the level of the front seat. With the defendant under secure restraint, Fisher drove to his uncle's hunting cabin in Worthington, Massachusetts, in the western part of the State, 128 miles from Mt. Ida Junior College. Though the surveillance for the night of December 8 had undoubtedly been prearranged, the judge was persuaded and found that the idea to remove the defendant to a remote, isolated hunting cabin was "spontaneous and unpremeditated."[10]

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[8] On one occasion, the larger group was assembled in the parking lot of the Sears store in the Fenway district to scour the area for clues or the victim's body.

[9] This incident precipitated the cessation of communication between Gawlinski and the father which lasted until the discovery of the body in December.

On reaching the cabin, Fisher gained entrance by breaking a pane of glass. The defendant was placed on a couch in the room farthest from the front door, and ice packs and snow were applied to the severe bruises on his face which had resulted from Ferreri's blow. At approximately 11:30 P.M.

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[10] In this respect, the judge found convincing the evidence that neither Ferreri nor Fontacchio knew where he was going when Fisher drove to the cabin, that the cabin was locked, that the group had to force an entry, and that the entire area was "knee-deep in snow." The judge concluded that Fisher was "the father of the thought" to take the defendant to Worthington.

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Ferreri and Fontacchio departed for Boston. Fisher, armed with a bread knife[11] which he exhibited to the defendant, remained in the room with the defendant. The judge found that they dozed intermittently.[12]

Interrogation of the defendant commenced on the return of Ferreri with Jay Campbell about 6 A.M. Questioning by the group[13] continued for over six hours. During that time, the defendant admitted nothing. The questioning was repetitious and insistent. The interrogators used extremely rough language and occasionally threatened the defendant's life. The judge was satisfied, however, that no physical force was applied. Finally, at approximately 12:30 P.M. the defendant said that he wanted to speak to Ferreri alone. Ferreri wanted Campbell present at any further conversation and the defendant finally agreed.

Alone in the room with these two, the defendant, after receiving assurances that he would not be harmed, related facts pertaining to the victim's death: He met her on the night of September 15 at a bus stop near the Sears store. When she told him that she was pregnant and that he was the father, he denied the responsibility and accused her of having relations with a man in California. She slapped him and he struck her in retaliation. She fell, hit her head on the curb, and lay motionless. After mouth-to-mouth resuscitation failed to revive her, the defendant realized she was dead. He carried her down a hill to some abandoned railroad tracks, wrapped her in a blanket he found there, dug a shallow grave with his shoes, and buried her. The defendant declined to specify the exact location of the body and would say only that the gravesite was in the area near the Sears store. However, he was willing to lead the group to the body.[14]

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[11] This was the first weapon used by any member of the group. There was some uncorroborated testimony that either Ferreri or Fontacchio had had a gun, but the judge disbelieved it.

[12] The trial judge found, and his conclusion appears amply justified, that escape at that time would have been impossible. The defendant had poor vision without his glasses. Even if he had succeeded in escaping from the cabin without drawing Fisher's attention, he would have faced the intractable problem of securing assistance in an isolated, snowbound area on a cold night.

[13] Fontacchio and Jay Heard arrived with breakfast at 10 A.M.

The interrogation ceased once the defendant had made these statements. The judge found that a spirit of relative friendliness supplanted the former hostile, strained relationship between the defendant and his captors. The defendant expressed relief at having finally disclosed his secret and referred to Ferreri and Campbell as friends. When the rest of the group returned, Ferreri persuaded the others to trust the defendant to lead them to the body. They tidied up the cabin and departed for Boston about 4:15 P.M.[15]

As the group emerged from the cabin with the defendant it encountered two hunters, David Tyler, the chief of police of Worthington, and Reino Liimatainen. Earlier in the day, Tyler had stopped at the cabin and, without identifying himself, had questioned Fisher about his occupation of the cabin. Though Fisher had partially satisfied Tyler as to his right to be there, Tyler had remained somewhat suspicious. At 4:15 P.M. Tyler questioned Fisher once again. Liimatainen, who harbored his own suspicions, sliped shells into the

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[14] In his testimony at voir dire, the defendant denied having made the incriminating statements. He admitted that, as a means of getting back to Boston, he had said that he would take the young men to the body. He testified that in fact he had known nothing about the body and implied that the young men knew its location and were seeking to fasten guilt on him. He sought to explain some of his conduct by testimony that the concerned group had said they were holding his brother hostage.

[15] The time interval from roughly 2 P.M. to 4:15 P.M. is not well accounted for in the voir dire record.

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chambers of his shotgun and, in a loud voice, said, "If there is any funny business I will blow your guts out." The judge found that the entire party, including the defendant, could hear this and that the group was under the hunters' "control" at this point. Fisher evidently allayed Tyler's suspicions once again, for the episode ended with the group's driving away in two cars. As they left, the defendant remarked to Ferreri, "See, I could have gotten away if I wanted to, but I didn't."[16]

The defendant directed Ferreri to drive to the Sears parking lot. They arrived in darkness at approximately 6:30 P.M.

The defendant described the gravesite to Ferreri as an overgrown area near an abandoned railroad spur below a grouping of three windows in a Metropolitan District Commission maintenance shed. Ferreri, alone, walked down a hill to the tracks. Unable to find the gravesite, he returned to the parking lot, where the others had remained, and told the defendant, "You will have to come down with me." The defendant refused and stated that the place was "spooked" and that they would kill him if he went down there. Heard handed the defendant a pocketknife for protection. Whereupon, Ferreri started down and was followed by the defendant, who held the open knife. The defendant refused to proceed the full distance to the grave, but he did point out its location. The defendant then returned to the parking lot. Ferreri, joined by Fontacchio and Campbell, ascertained that a body was buried at the place indicated. Ferreri then drove the defendant to a point a short distance from his home.

While Ferreri had been searching the track area the first time, the defendant found himself momentarily alone with Heard and casually acknowledged that he had killed the victim. In response to a question from Heard, he said that he was not worried about the consequences because the abductors would be hostile witnesses whose testimony would not stand up in court, and because his grandmother would hire a certain well-known lawyer who would get him off. Asked how he had expected to get away with it at the time, the defendant replied that he had thought the rainfall on September 15 would prevent police dogs from discovering the body.

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[16] The judge's finding in this respect is principally based on Ferreri's testimony.

Subsequent Events: Police Reinvolvement. Sometime that evening, the group notified the victim's family that her body had been found. About 11:30 P.M. the father telephoned Gawlinski, who had just returned home from attending classes and studying at Northeastern University, described the location of the body, and gave a somewhat cryptic, incomplete account of the events leading up to the discovery. After Gawlinski finished his telephone conversation with the father, his wife informed him that the defendant's attorney had tried several times to reach him that night. Gawlinski did not return the attorney's calls. He informed his partner in the case and a private investigator the father had hired that the body had been discovered and, after some delay, drove to the gravesite.

About 3 A.M. Gawlinski and other officers went to the defendant's home.[17] From there, they proceeded to the Massachusetts General Hospital, where the defendant had been admitted as a patient. At the hospital, after securing permission to speak to the defendant, two officers went to his room[18] with a police stenographer while Gawlinski remained downstairs.

The defendant was interrogated from 3:30 A.M. until 7:30 A.M. Before questioning him, the police gave the defendant

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[17] The defendant's mother told Gawlinski in the presence of other officers that the defendant's attorney wished to speak to Gawlinski.

[18] During the course of questioning, the defendant was moved from a room he shared with three other patients to a corridor, and thence to a private room.

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the *Miranda* warnings. The defendant did not request counsel or respond to the precise question whether he understood the warnings. On at least four occasions, he did ask to have his parents present. Nevertheless, the police continued their questioning. The defendant did not respond to some questions; others were answered in a halting manner. The judge found that the defendant showed intelligent discrimination and some control over the course of the interrogation.[19] Ultimately, the defendant allegedly made a statement which, in substance, reiterated the story he had related to the concerned group in the cabin.

About 7:30 A.M. on December 10, the interrogating officers left the hospital and met Gawlinski at the entrance. At 8:30 A.M. one of them, Sergeant Daley, wrote down his recollection of the defendant's statement. The following morning, December 11, the defendant was discharged from the hospital. He was indicted on December 15, 1971.

Principal Motions and Assignments of Error.[20] After the voir dire hearing on motions to suppress, the judge ruled that all statements which the defendant had made to his kidnappers prior to the departure of the party from the cabin at 4:15 P.M. were to be suppressed and inadmissible at trial because they were the product of coercion. In this respect, the judge attached no significance to the fact that the defendant was coerced by private persons and not by police. However, he ruled that later statements to the kidnappers and "statements and actions leading to the discovery of the body of the deceased near . . . [the Sears store in] the early evening of December 9, 1971" would be admissible. These statements and actions he found to be voluntary and the result of the exercise of the defendant's "free will."[21] The defendant assigns this ruling as error.

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[19] For example, the defendant objected to the stenographer's presence and he was dismissed.

[20] We omit mention of the numerous assignments of error which have not been argued and are deemed waived. See p. , *supra* (Mass. Adv. Sh. [1975] p.). We also omit mention of one assignment of error which, though it was argued before this court, considered by us and found to be without merit, has not received extended discussion hereinbelow.

The defendant also moved to suppress the statement allegedly made by him to the police at the Massachusetts General Hospital on the morning of December 10, 1971. The judge ruled that as the police had knowingly denied the defendant the benefit of advice of his counsel, the statement was not admissible in the Commonwealth's case in chief. Nevertheless, he ruled on the authority of *Harris* v. *New York,* 401 U. S. 222 (1971), that the Commonwealth could introduce the statement by way of impeachment if the defendant testified. The defendant, who testified at voir dire but not at trial, assigns the latter ruling as error.

I. MIRANDA WARNINGS BY THE CONCERNED GROUP.

We disagree with the defendant's contention that the failure of his kidnappers to apprise him of his *Miranda* rights requires suppression of all statements made on December 9. In *Miranda* v. *Arizona,* 384 U. S. 436, 444, 461 (1966), the Supreme Court formulated a series of prophylactic rules (see *Michigan* v. *Tucker,* 417 U. S. 433, 444 [1974]), designed "to secure the privilege against self-incrimination" from overreaching and coercion during custodial interrogation. Custodial interrogation was defined as "questioning initiated by *law enforcement officers* after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way" (emphasis supplied). *Miranda* v. *Arizona, supra,* at 444. *Commonwealth* v. *White,* 353 Mass. 409, 415-

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[21] He also ruled that these statements "amounted only to *admissions*" (emphasis in original) and, as such, were not entitled to the full safeguards accorded confessions under Massachusetts law. See n. 24, *infra*.

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416 (1967), cert. den. 391 U. S. 968 (1968). In the instant case, the kidnappers were not law enforcement officers. They were private citizens embarked on an illegal enterprise. The *Miranda* rules do not extend to their activities. See *United States* v. *Antonelli,* 434 F. 2d 335, 337 (2d Cir. 1970), and authorities cited; *United States* v. *Bolden,* 461 F. 2d 998 (8th Cir. 1972); *United States* v. *Casteel,* 476 F. 2d 152 (10th Cir. 1973).

Nevertheless, the defendant argues that the "connection" among the kidnappers, the father, and Gawlinski "clothed the actions of the kidnappers with police authority." Again, we disagree. Of course, the police may not accomplish through private proxies what they cannot do directly. If the defendant had shown that the group of kidnappers was "functioning as an instrument of the police" (*United States* v. *Brown,* 466 F. 2d 493, 495 [10th Cir. 1972]; cf. *Coolidge* v. *New Hampshire,* 403 U. S. 443, 487 [1971]), or acting as an agent of the police pursuant to a scheme to elicit statements from the defendant by coercion or guile (cf., e.g., *Commonwealth* v. *White, supra,* at 416; *Commonwealth* v. *Martin,* 357 Mass. 190, 193 [1970]), the statements would have to be suppressed for failure to give *Miranda* warnings. However, we agree with the judge that the subsidiary facts developed at voir dire supported the conclusion that the defendant did not establish such a police connection. It is true that Gawlinski worked closely with the victim's father in the initial stages of his investigation. (This was to be expected.) It is also true that he was aware of the surveillance undertaken by the concerned group and aware of the father's deepening bitterness and frustration and that, despite his awareness, he did not order the father and his associates to refrain from futher investigation and repeatedly professed himself willing to follow any leads which private efforts uncovered. Yet, when considered in all the circumstances, these facts are insufficient to establish police connivance in, and responsibility for, the events of December 8 and 9. Gawlinski vehemently opposed any conduct which would harm the defendant or interfere with his liberty. He cautioned the father against any "rough stuff" and threatened to prosecute anyone who violated the law. In August, 1971, after the incident at Henry F. Bryant & Son, Inc., Gawlinski reprimanded the father. The two had harsh words, and communication between them, which had been sporadic since April, lapsed completely until December 9.[22] Moreover, Gawlinski was not shown to have had foreknowledge of the kidnapping plan and first learned of its occurrence at 11:30 P.M. on December 9. In these circumstances, despite whatever encouragement the kidnappers may have felt they had received from Gawlinski's talk about possible leads, we cannot say that they acted as agents or instruments of the police in extracting statements from the defendant and that the absence of *Miranda* warnings required suppression of those statements.[23]

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[22] The judge attributed this lapse to Gawlinski's disgust over the incident.

[23] The defendant's reliance on *Gambino* v. *United States,* 275 U. S. 310 (1927), and *Knoll Associates, Inc.* v. *Federal Trade Commn.* 397 F. 2d 530 (7th Cir. 1968), is misplaced. In *Gambino*, New York State troopers had coöperated extensively with the Federal government over a period of months to control liquor traffic at a United States border. The search and seizure challenged in the case had been undertaken "solely for the purpose of aiding the United States in the enforcement of its laws." *Gambino* v. *United States, supra,* at 317. In *Knoll Associates* the court set aside an order of the Federal Trade Commission because it was based on evidence obtained through a "theft of corporate documents on behalf of the government for use in a then pending proceeding against the corporate owner of what was stolen." *Knoll Associates, Inc.* v. *Federal Trade Commission, supra,* at 535. In the instant case, coöperation between the concerned group and Gawlinski had been sporadic at best. At the time of the abduction, he had never spoken to members of the group who abducted the defendant and had not spoken to the father for over three months. It could not be said that the abduction had as its sole purpose aid to the enforcement of the law. There was no

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II. VOLUNTARINESS OF POST-4:15 STATEMENTS TO THE ABDUCTORS.

1. Since the *Miranda* rules are not apposite to the statements[24] made by the defendant to his abductors, the admissibility of these statements at trial is governed by the due process standard of voluntariness. *Delle Chiaie* v. *Commonwealth,* Mass. , (1975).[d] *Davis* v. *North Carolina,* 384 U. S. 737, 740 (1966). *Procunier* v. *Atchley,* 400

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proceeding pending at the time against the defendant. Indeed, no crime was then officially under investigation.

Moreover, each of the cases relied on by the defendant is a Fourth Amendment case, implicating the full range of protection for a right of constitutional dimension. As noted above, the *Miranda* rules are only prophylactic rules which *themselves* safeguard rights of constitutional magnitude. These Fourth Amendment cases do not support extension of *Miranda* in this case.

[24] The judge found that the statements made after 4:15 P.M. "amounted only to *admissions* and not *confessions* because they did not amount to an 'acknowledgment of guilt of the entire crime charged'" (emphasis in the original). See *Commonwealth v. Haywood,* 247 Mass. 16, 18 (1923). Under settled Massachusetts law, a defendant is entitled to lesser safeguards with respect to the admissibility of admissions and exculpatory statements than he would have if the statements had amounted to a confession. *Commonwealth* v. *Chapman*, 345 Mass. 251, 254 (1962). See *Commonwealth* v. *Dascalakis,* 243 Mass. 519, 521 (1923); *Commonwealth* v. *Haywood, supra*, at 17-18; *Commonwealth* v. *Gleason,* 262 Mass. 185, 190 (1928). Though this distinction has been criticised (*Commonwealth* v. *Wallace,* 346 Mass. 9, 17 [1963]), we do not consider its continuing validity in the instant case because we deem correct the admission at trial of evidence concerning the defendant's post-4:15 statements and actions even under the more stringent standards applicable to confessions. Throughout this opinion, we refer to the defendant's admissions as "statements."

[d] Mass. Adv. Sh. (1975) 1220, 1227.

U. S. 446, 453 (1971). A conviction founded in whole or in part on statements which are the product of physical or psychological coercion deprives the defendant of his right to due process of law under the Fourteenth Amendment and, as a consequence, is invalid. *Rogers* v. *Richmond,* 365 U. S. 534, 540-541 (1961). *Jackson* v. *Denno,* 378 U. S. 368, 376 (1964). See *Commonwealth* v. *Harris,* Mass. (1973.[e] Such convictions are invalid irrespective of the truth or falsity of the statements admitted. "The use of coerced confessions . . . is forbidden because the method used to extract them offends constitutional principles" (*Lego* v. *Twomey,* 404 U. S. 477, 485 [1972]) and because "declarations procured by torture [or other coercive means] are not premises from which a civilized forum will infer guilt." *Lyons* v. *Oklahoma,* 322 U. S. 596, 605 (1944). See *Rogers* v. *Richmond, supra,* at 540-541; *Jackson* v. *Denno, supra,* at 385-386. Cf. *Stein* v. *New York,* 346 U. S. 156, 192 (1953).

There is no easy acid test for voluntariness. Judicial determinations must rest on more than a "mere color-matching" comparison of analogous cases. *Reck* v. *Pate,* 367 U. S. 433, 442 (1961). In each case, the court must assess the totality of relevant circumstances to ensure that the defendant's confession was a free and voluntary act and was not the product of inquisitorial activity which had overborne his will. *Clewis* v. *Texas,* 386 U. S. 707, 708 (1967). *Procunier* v. *Atchley,* 400 U. S. 446, 453 (1971), and cases cited. *Delle Chiaie* v. *Commonwealth,* Mass. , (1975).[f] See *Schneckloth* v. *Bustamonte,* 412 U. S. 218, 225-226 (1973). The burden of proof is on the government to show such voluntariness by a preponderance of the evidence. *Jackson* v.

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[e] Mass. Adv. Sh. (1973) 1379, 1384-1385.

[f] Mass. Adv. Sh. (1975) 1220, 1227.

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Denno, 378 U. S. 368, 376-377 (1964). *Lego* v. *Twomey*, 404 U. S. 477, 489 (1972).[25]

2. These principles apply even though the statements were extracted by private coercion, unalloyed with any official government involvement. We have not squarely decided this point previously, but it is implicit in our decisions in *Commonwealth* v. *White*, 353 Mass. 409, 417-418 (1967), cert. den. 391 U. S. 968 (1968) (voluntariness test applied to confession made to private parties after two statements to police which were inadmissible under *Miranda*), *Commonwealth* v. *Wallace*, 356 Mass. 92, 96-97 (1969) (statements to Canadian police), and *Commonwealth* v. *Martin*, 357 Mass. 190, 193 (1970) . The Supreme Court of the United States has not spoken to the question[26] but it has invoked the usual analysis where pressure was exerted by private persons while the defendant was nominally in official custody. See *Thomas* v. *Arizona*, 356 U. S. 390 (1958) (private citizen, a member of a posse, abused a prisoner who later confessed to the authorities). A number of State courts have applied the due process analysis to circumstances in which the only claimed coercion leading to a confession was private. See, e.g., *Palmore* v. *State*, 244 Ala. 227 (1943); *State* v. *Christopher*, 10 Ariz. App. 169 (1969); *People* v. *Haydel*, 12 Cal. 3d 190 (1974); *Lawton* v. *State*, 152 Fla. 821 (1943).

Underlying the above-cited decisions in this jurisdiction and other jurisdictions is the fundamental recognition that a statement obtained through coercion and introduced at trial is every bit as offensive to civilized standards of adjudication when the coercion flows from private hands as when official depredations elicit a confession. Statements extracted by a howling lynch mob or a lawless private pack of vigilantes from a terrorized, pliable suspect are repugnant to due process mandates of fundamental fairness and protection against compulsory self-incrimination. See *People* v. *Berve,* 51 Cal. 2d 286, 290 (1958).

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[25] This proposition is now established as a constitutional right. The different view expressed in *Commonwealth* v. *Johnson*, 352 Mass. 311, 315-316 (1967), cert. dism. 390 U. S. 511 (1968), must be taken to be superseded. We need not inquire how far the *Johnson* case was qualified by *Commonwealth* v. *Cain*, 361 Mass. 224, 228 (1972) (Mass. Adv. Sh. [1972] 373, 376).

[26] Arguably, the Supreme Court's position is implicit in *Bram* v. *United States*, 168 U. S. 532 (1897), which strongly resembles *Commonwealth* v. *Wallace*, *supra*.

3. When, as in the instant case, several statements given at different times by the defendant must be evaluated for voluntariness, a finding that an earlier statement was involuntary does not necessarily require suppression of the later statements. "The admissibility of the later confession depends upon the same test — is it voluntary. Of course the fact that the earlier statement was obtained from the prisoner by coercion is to be considered in appraising the character of the later confession. The effect of earlier abuse may be so clear as to forbid any other inference than that it dominated the mind of the accused to such an extent that the later confession is involuntary. . . ." *Commonwealth* v. *White,* 353 Mass. 409, 417 (1967), cert. den. 391 U. S. 968 (1968), quoting from *Lyons* v. *Oklahoma,* 322 U. S. 596, 603 (1944). It is equally true, however, that the defendant may have been under no compulsion at the time of the later statements and may have felt no effect of the earlier abuse at the time. The later statements, then, would be admissible. The United States Supreme Court has never held that "making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed." *United States* v. *Bayer,* 331 U. S. 532, 541 (1947).

Two lines of analysis emerge from the case law and guide our analysis of the voluntariness of the defendant's post-4:15 statements. We are still required to look to the "totality of the circumstances." *Clewis* v. *Texas,* 386 U. S. 707, 710 (1967).

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Darwin v. *Connecticut,* 391 U. S. 346, 349 (1968). See *United States* v. *Bayer, supra,* at 540-541. However, these lines of analysis furnish convenient, commonsense approaches to ordering and evaluating the necessary elements of the circumstances which bear on the voluntariness of the later statements. In the first line of analysis, the court must look for a "break in the stream of events," the coercive circumstances which extracted earlier statements, "sufficient to insulate the [subsequent] statement from the effect of all that went before." *Clewis* v. *Texas, supra,* at 710. The focus of this line of analysis is on external constraints, continuing or new, which may have overborne the defendant's will. When circumstances no longer coerce the defendant, a break in the stream has occurred. The second line of analysis looks more specifically to the effect of the previous confession on the defendant's will. To be admissible, subsequent statements may not be "merely the product of the erroneous impression that the cat was already out of the bag" (*Darwin* v. *Connecticut,* 391 U. S. 346, 351 [1968] [Harlan, J., concurring and dissenting]) because one coerced confession has let the secret "out for good." *United States* v. *Bayer,* 331 U. S. 532, 540 (1947).

Pursuant to our order of January 8, 1975, the judge has filed supplementary findings addressing the issue of voluntariness as elucidated by these lines of analysis. After a detailed recitation of the evidence and the facts found by him, he concluded that the post-4:15 P.M. statements made by the defendant to his abductors were voluntary and admissible. We believe such a conclusion was warranted.

a. *Break in the Stream of Events.* The judge quite correctly ruled that statements obtained by the concerned group from the defendant prior to the departure from the cabin were involuntary because "induced by threats, duress, intimidation, fear, and at least some violence (the original striking of the defendant at Mt. Ida)." The defendant, held incommunicado (see, e.g., *Rogers* v. *Richmond,* 365 U. S. 534, 536 [1961]) by his violent, law-breaking captors (see, e.g., *Brown* v. *Mississippi*, 297 U. S. 278 [1936]) in a remote hunting cabin, was subjected to continuous rough questioning and threats (see, e.g., *Lynumn* v. *Illinois*, 372 U. S. 528 [1963]) designed to overcome his resistance and extract by psychological compulsion what he would not give freely. These circumstances are "so inherently coercive that . . . [their] very existence is irreconcilable with the possession of mental freedom [by the person] . . . against whom . . . [the] full coercive force is brought to bear." *Ashcraft* v. *Tennessee*, 322 U. S. 143, 154 (1944). *Reck* v. *Pate*, 367 U. S. 433, 442 (1961).

However, as the trial judge found on sufficient evidence, once the defendant had admitted his connection with the death, all hostility and intimidation ceased. The defendant's captors no longer threatened him or sought to elicit further information through their rough persistent questioning. A peculiar relationship of friendship and mutual trust seems to have arisen between Ferreri and the defendant. Thus, though the defendant remained captive while the concerned group discussed their next move, the atmosphere of coercion had been dispelled to a large extent.

After the group had left the cabin, even the vestige of coercion inherent in the group's control over the defendant's person vanished. Numerous opportunities for escape were presented to the defendant. The defendant eschewed these opportunities, though, as the trial judge found on ample evidence,[27] he "knew he could have effected an escape." The defendant could have made some protest or sign when the group was within range of the hunters' guns. The warning about "funny business," issued by Liimatainen, was an

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[27] One example is Ferreri's testimony concerning the defendant's statements to him after the incident with the hunters. As recounted by Ferreri, these statements reflect the defendant's awareness of, and express rejection of, the opportunity for escape presented by the appearance of the hunters.

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invitation to outcry by the defendant. Yet he chose not to seek assistance. Similarly, on the trip back to Boston, the defendant made no attempt to attract attention at the Massachusetts Turnpike toll booths through which the group passed. While Fontacchio and Campbell, the other members of the concerned group in the car, dozed, the defendant conversed in a friendly manner with Ferreri, the driver. At the Weston toll, the defendant contributed part of the necessary payment because Ferreri lacked sufficient funds. When the group reached the Sears parking lot, the defendant again let pass opportunities for escape. He did not attempt to escape to the nearby MBTA station or to mingle with shoppers traversing the parking lot. He could have but did not create a disturbance which would have drawn public attention to his plight.

Rather, he acted like a man who felt sufficiently in control of his circumstances to make a free choice. Initially, he refused to go down to the burial site, but he agreed when armed with the only weapon then in evidence. Even then, he exercised his will and halted short of the precise site. He gave Ferreri directions to the body and, while Ferreri searched, engaged in casual incriminating conversation with Heard. His statements to Heard exhibited a bravado and lack of fear which were indicative of mental freedom of action.

Given the opportunities for escape, the lack of physical restraint, and the defendant's possession of the weapon, we believe that the judge had ample justification for his finding that the defendant's statements and actions were not products of coercion exerted after he left the cabin. These factors separate the later statements from the coercive circumstances surrounding the earlier ones. Cf. *Clewis* v. *Texas,* 386 U. S. 707, 710 (1967). This is not a case such as *Leyra* v. *Denno,* 347 U. S. 556 (1954), or *Beecher* v. *Alabama,* 389 U. S. 35 (1967), in which the later statements were extracted by part of a continuous coercive process. This is not a case such as *Reck* v. *Pate,* 367 U. S. 433 (1961), *Clewis* v. *Texas,* 386 U. S. 707 (1967), or *Darwin* v. *Connecticut,* 391 U. S. 346 (1968), in which the defendant remained in official custody without access to potentially friendly faces[28] or intercession for the duration of the "stream of events." The objective evidence of the defendant's behavior after leaving the cabin substantiates the judge's finding that the mere continuation in the presence of the concerned group did not coerce the defendant or render his post-4:15 P.M. statements involuntary.

b. *Cat Out of the Bag.* The cat-out-of-the-bag line of analysis requires the exclusion of a statement if, in giving the statement, the defendant was motivated by the belief that, after a prior coerced statement, his effort to withhold further information would be futile and he had nothing to lose by repetition or amplification of the earlier statements. Such a statement would be inadmissible as the direct product of the earlier coerced statement. The primary exposition of the underlying proposition by the United States Supreme Court occurs in *United States v. Bayer*, 331 U. S. 532, 540-541 (1947). Mr. Justice Jackson wrote: "Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first," However, Mr. Justice Jackson qualified his statement of the principle: "But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed."

Mr. Justice Harlan returned to the point in his opinion (concurring in part and dissenting in part) in *Darwin* v. *Connecticut*, 391 U. S. 346, 350-351 (1968). He wrote: "A principal reason why a suspect might make a second or third

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[28] See *Goldsmith* v. *United States*, 277 F. 2d 335 (D. C. Cir. 1960), cert. den. sub nom. *Carter* v. *United States*, 364 U. S. 863 (1960).

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confession is simply that, having already confessed once or twice, he might think he has little to lose by repetition. If a first confession is not shown to be voluntary, I do not think a later confession that is merely a direct product of the earlier one should be held to be voluntary. It would be neither conducive to good police work, nor fair to a suspect, to allow the erroneous impression that he has nothing to lose to play the major role in a defendant's decision to speak a second or third time. . . . I would remand for further proceedings, in order to give the prosecution the opportunity to show that the third confession was not merely the product of the erroneous impression that the cat was already out of the bag." *Id.* at 350-351.[29]

The evidence supports the supplementary finding of the judge that there was "no 'cat out of the bag' aspect to . . . [the defendant's post-4:15 P.M.] statements and actions." The judge was warranted in finding that the defendant did not yield further information out of a conviction that his first coerced statement had damned him and in finding that subsequent admissions were not attributable to a feeling that nothing further would be lost by repetition. As the judge found, the defendant "evidenced no fear of culpability" after the statements in the cabin and did not believe what he said in the cabin would have serious adverse effects.[30] In his conversation with Heard, the defendant disclaimed any fear that the statements made under coercion would lead to his conviction. He stated that a (specific) good lawyer would discredit his abductors' testimony and secure his acquittal in any subsequent proceeding. He may have thought he had "little to lose" (*Darwin* v. *Connecticut,* 391 U. S. 346, 350 [1968] [Harlan, J.]) through further admissions, but not because he feared the use of his previous statements. He may have thought he had "little to lose" based on an actual belief that he could not be convicted. Perhaps he thought that the kidnappers believed and accepted his story that the victim's death was accidental.

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[29] See, further, *Harrison* v. *United States,* 392 U. S. 219, 226-228 (1968) (opinion of the court and dissenting opinion of Harlan, J.); *United States* v. *Gorman,* 355 F. 2d 151, 157 (2d Cir. 1965), cert. den. 384 U. S. 1024 (1966). Cf. *Commonwealth* v. *Spofford,* 343 Mass. 703 (1962).

[30] Actually his statements were somewhat exculpatory and indicated that the death was accidental.

The post-4:15 statements and actions appear to be attributable to the peculiar friendship which the defendant formed with Ferreri or to relief at having divulged his secret at last.[31] Neither of these sentiments is the sentiment against which the cat-out-of-the-bag analysis would guard. Fear, continuation of coercive effects, and a sense of the futility of attempting to "get the cat back in the bag" are the objects of the analysis. See *Darwin* v. *Connecticut, supra,* at 350; *Harrison* v. *United States,* 392 U. S. 219, 224-226 (1968).

In these circumstances, we cannot say, contrary to the judge's findings, that the post-4:15 statements and actions were involuntary because they were products of earlier statements. Cf. *United States* v. *Gorman,* 355 F. 2d 151, 157 (2d Cir. 1965), cert. den. 384 U. S. 1024 (1966).[32]

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[31] The judge found that the defendant "had a wish to get things off his chest . . . and was very relieved after he gave his first statement in the cabin in Worthington."

[32] We do not deal separately here with the question whether the defendant's post-4:15 statements and actions, including those leading to the discovery of the body, were the "fruits" of the earlier involuntary statements. See *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385 (1920); *Nardone* v. *United States,* 308 U. S. 338 (1939); *Wong Sun* v. *United States,* 371 U. S. 471 (1963). In the context of the instant case, the factual inquiry required to decide whether the causal connection between the earlier statements and the later ones had "become so attenuated as to dissipate the taint" of the earlier coercion (*Nardone* v. *United States, supra,* at 341; *Wong Sun* v. *United States, supra,* at 491) tracks the cat-out-of-the bag analysis. In each line of analysis, the court must examine the circumstances to determine if the later statements were the product

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4. In holding the post-4:15 statements made to the abductors admissible, we do not in any way approve the illegal and reprehensible manner in which they were obtained. Justice Kaplan's dissent begins with a statement which focuses attention on the "dangerous vigilantism" evident in this case and which indicates that such vigilantism must not be condoned. We join with him in vigorous condemnation of the violence, kidnapping and intimidation practiced by the members of the concerned group. Regardless of the nature of the crime alleged to have been committed by the defendant, there can be no justification for such unlawful conduct. Such conduct, apart from its illegality, is contrary to all acceptable norms of human behavior. It cannot be countenanced in any form. The rule of law and lawful procedures must be followed.

Having said this much, we must add that it is also the duty of this court to follow settled rules of law in its review of the facts of the case found by the trial judge. It is settled (and undisputed) that an appellate court cannot disturb the judge's findings of subsidiary facts if they are supported by the evidence. In like manner, the court may not draw inferences contrary to those of the trial judge which were derived from his subsidiary findings *and* from oral testimony. See *Glover* v. *Waltham Laundry Co.* 235 Mass. 330, 333 (1920). There is a very real and practical reason for the rule: The appellate court did not conduct the trial or the voir dire. It has neither heard the witnesses nor seen all of the evidence. It lacks the exposure to appearance and demeanor on the witness stand which assists the trial judge in his evaluation of veracity and resolution of conflicting testimony.

In the instant case, none of the dissenters is willing to say

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of the lingering psychological effects of the prior coerced confession. Having concluded pursuant to the cat-out-of-the-bag analysis that the defendant's subsequent statements and actions resulted from an independent, voluntary decision to coöperate with his abductors, we also conclude that the statements and actions were not the "fruits" of the prior involuntary statements.

that the judge below was plainly wrong in his findings. Each purports to accept the basic "historical or subsidiary facts" found below but then reaches a result inconsistent with the trial judge's factual finding that the defendant was "completely free from fear" after the encounter with the hunters. Justice Kaplan returns to the record in order to divine the defendant's state of mind throughout the period following the departure from the cabin. He concludes (contrary to the trial judge's findings) that "the defendant remained under the heel of the kidnappers" and that his "statements at the Sears parking lot were . . . made within a continuing constraint and compulsion." Justice Hennessey, while unwilling to draw these further inferences, nevertheless finds that the Commonwealth has not proved that the defendant's admissions were voluntary by a fair preponderance of the evidence. He refuses to be bound by the judge's "inference . . . that is synonymous with voluntariness."

Is it now open to this court to disregard the trial judge's findings and to come to a contrary conclusion? We think not. A decision as to the voluntariness of the defendant's admissions involves determination of his state of mind at the time they were made. State of mind is a question of face. See *Kelley* v. *Jordan Marsh Co.* 278 Mass. 101, 106 (1932); *Commonwealth* v. *Holiday,* 349 Mass. 126, 128 (1965). It can be established by the defendant's direct testimony or through reasonable inferences drawn from other proved facts and demeanor evidence. In the instant case, the defendant testified directly to the precise question at issue — namely, his state of mind at the time he agreed to disclose the gravesite to the concerned group. He testified that he had agreed to lead the group to the body in order to get out of the cabin. He claimed that members of the group had told him that he would never leave the cabin alive if he did not tell them the location of the body. Thus, it was his story that fear engendered his coöperation with his captors, his disclosure of the gravesite and his other admissions. However, this testimony cannot be of any significance here and cannot be employed to

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support inferences contrary to those of the trial judge. The trial judge, who had the opportunity to observe all of the witnesses, evaluated the defendant's testimony and rejected it. The judge observed the defendant on the stand, his appearance and his mannerisms; the tone of his voice and his attitude as he was examined and cross-examined; his facial expressions and his general demeanor.[33] In short, the trial judge's primary function on this issue (voluntariness) was to ascertain the defendant's state of mind — whether he was telling the truth as to the reasons he gave for his decision to reveal the gravesite (and *as to his state of mind*). The trial judge, in rejecting the defendant's testimony, necessarily found that he was not telling the truth. This was a finding of fact based on oral testimony of the defendant and of other witnesses. An appellate court cannot find to the contrary.

This is not to say that merely because the judge disbelieved the defendant's testimony he could, without additional evidence, find the reverse to be true. His finding of the reverse must be supported by other relevant evidence. Here there was extensive testimony, as fully delineated elsewhere in this opinion, tending to demonstrate the change of mood and relationship found by the judge below. It was more than sufficient to sustain the government's burden of proof. The judge's finding of voluntariness must stand.

III. STATEMENT TO THE POLICE AT HOSPITAL—THE HARRIS *vs.* NEW YORK PROBLEM

1. The judge quite properly suppressed all statements made to the police in the Massachusetts General Hospital on December 10 for purposes of the prosecution's case in chief. Police conduct at the hospital was clearly inconsistent with

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[33] "The smile, the blush, the harsh or soft voice, the shrug, even the dilation of a pupil may send a message and alter the tone of the trial. Myriad subtle communications of our bodies are lost in the stenotype machine." 1 Weinstein & Berger, Weinstein's Evidence (1975) iv.

the standards for custodial interrogation established by *Miranda* v. *Arizona,* 384 U. S. 436 (1966). It is true that an officer read the requisite *Miranda* warnings to the defendant and then requested that the defendant read the *Miranda* warning card. However, none of the officers apprised the defendant of his lawyer's efforts to speak to Gawlinski or informed the attorney that a custodial interrogation of his client was in progress. Gawlinski, who was most familiar with the case and who knew both that the defendant had had counsel for many months and that counsel wished urgently to contact a responsible police official, conspicuously absented himself from the interrogation. The judge stated that "conduct on the part of prosecuting officers was at least heedless, if not deliberate, and I can conclude only that it was a course of conduct calculated to circumvent . . . [the defendant's] constitutional rights to have the benefit, aid, and counsel of his attorney."

The *Miranda* safeguards encompass more than a simple explanation to a suspect that he has a right to remain silent and a right to counsel. The suspect must "be afforded the opportunity to exercise these rights throughout the interrogation. . . . [H]e . . . [is] entitled to know of his counsel's availability and, with that knowledge, to make the choice [to forgo the benefits of counsel] with intelligence and understanding." *Commonwealth* v. *McKenna,* 355 Mass. 313, 324 (1969). In previous cases, we have noted that police may not thwart counsel who seeks to confer with a client (*Commonwealth* v. *McKenna, supra,* at 325-326) and have held inadmissible statements elicited by the police in the absence of counsel after an attorney has entered the case when no intentional and knowing waiver of the right to counsel was proved (*Commonwealth* v. *Murray,* 359 Mass. 541, 544-546 [1971]). Cf. *Commonwealth* v. *Cain,* 361 Mass. 224, 227-229 (1972).[8] Similarly, in the instant case, the defendant's state-

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[8] Mass. Adv. Sh. (1972) 373, 376-377.

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ments in the hospital were inadmissible for the prosecution's case in chief.

Nevertheless, we hold that the defendant's statements, if voluntary and trustworthy,[34] were available to impeach his testimony if he took the stand.[35] *Harris* v. *New York,* 401 U. S. 222 (1971), and *Oregon* v. *Hass,* U. S. (1975),[h] are controlling.

In *Harris* v. *New York,* the defendant took the stand and denied having sold heroin to an undercover officer. On cross-examination, he was asked whether he had made certain statements[36] to the police shortly after his arrest. The transcript of the interrogation showed that the police had not advised the defendant of his right to appointed counsel at the time. Despite this infringement of the *Miranda* safeguards (*Miranda* v. *Arizona, supra,* at 444), the Supreme Court held that the statements had been properly admitted to impeach the defendant's testimony. The court rejected the argument that under *Miranda* "evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes." *Harris* v. *New York, supra,* at 224. In the court's view, a valid policy consideration, the possibility that the defendant might deliver perjurious testimony, outweighed the extra measure of deterrence to unconstitutional police action which might be achieved by total exclusion of such evidence. Mr. Chief Justice Burger wrote for the court: "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. . . . The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Id.* at 225-226. The court noted, however, that there had been no claim that the statements made to police were coerced or involuntary and that "the trustworthiness of the evidence [must] satisf[y] legal standards." *Id.* at 224.

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[34] The question of voluntariness is considered *infra.* The defendant does not explicitly challenge the availability of these statements on the ground that they are untrustworthy. Indeed, the other evidence in the case corroborates them. Nevertheless, a claim of untrustworthiness is implicit in the claim of involuntariness. At common law, coerced confessions were excluded from evidence because of their inherent untrustworthiness. Wigmore, Evidence, § 822 (a), p. 330 (Chadbourn rev. 1970). See, e.g., *Commonwealth* v. *Morey,* 1 Gray 461, 462-463 (1854); *Commonwealth* v. *Myers,* 160 Mass. 530, 532 (1894); *Lisenba* v. *California,* 314 U. S. 219, 236 (1941). Though this is not the principal justification for exclusion of coerced confessions under the due process clause of the Fourteenth Amendment, the Supreme Court has noted "the probable unreliability of confessions that are obtained in a manner deemed coercive." *Jackson* v. *Denno,* 378 U. S. 368, 386 (1964).

[35] He did not testify at the trial before the jury.

[h] (March 19, 1975) 43 U. S. L. Week 4417.

[36] The statements had been suppressed for purposes of the prosecution's case in chief.

In *Oregon* v. *Hass,* the court again spoke to the issue whether evidence obtained by the police without strict compliance with *Miranda* standards was admissible for impeachment purposes. After his arrest for bicycle theft, Hass was given the *Miranda* warnings. He admitted that he had stolen two bicycles but was uncertain which one was the subject of the investigation. He and a police officer then departed for the place where he had left one of the stolen bicycles. On the way, Hass commented that he " 'was in a lot of trouble' " and wanted to telephone his attorney. The police officer replied that Hass could use the telephone after they returned to the "office." Thereafter, Hass guided the police officer to the bicycle and pointed out the locations of the houses from which he had stolen the two bicycles. At trial, Hass's statements to the police officer after his request for counsel were admitted only as to the credibility of his testimony. The Oregon Court of Appeals reversed his subsequent conviction and the Supreme Court of Oregon affirmed the reversal. The United States Supreme Court, on the authority of *Harris* v. *New*

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York, reversed. The court reiterated its concern that exclusionary rules could "free [the defendant] from the embarrassment of impeachment evidence from . . . [his] own mouth" (*Oregon* v. *Hass,* U. S. , [1975])[i] and emphasized, as it had in *Harris,* the valuable aid which the defendant's statements would provide to the jury in assessing his credibility. *Id.* at .[j] The court found no "valid distinction" between the situation in *Harris,* which involved defective *Miranda* warnings, a violation of a prophylactic rule,[37] and the situation in *Hass,* which involved the failure to afford a suspect his full constitutional right to counsel after his attempt to exercise that right.[38] The court added, however, that "[i]f, in a given case, the officer's conduct amounts to abuse, that case, like those involving coercion or duress, may be taken care of when it arises measured by the traditional standards for evaluating voluntariness and trustworthiness." *Id.* at .[k]

We believe the *Harris* and *Hass* exception to the exclusionary rule of *Miranda* and like cases permits introduction of the defendant's statements (if they are voluntary and trustworthy) to impeach his direct testimony. Functionally,[39] the violation of the defendant's rights in the instant case is closely analogous to that in *Harris* and *Hass*. In each case, the deprivation of rights stems from the failure of police to provide a suspect with counsel to whom he was entitled. Just as Harris received no assistance from the appointed counsel to whom he was entitled and Hass did not have a timely opportunity to consult counsel whom he had requested, so the defendant here did not benefit from the assistance of counsel who urgently wished to reach him.

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[i] (March 19, 1975) 43 U. S. L. Week 4417, 4420.

[j] (March 19, 1975) 43 U. S. L. Week at 4419.

[37] In *Michigan* v. *Tucker,* 417 U. S. 433, 446 (1974), the court held that "police conduct at issue . . . [in the case] did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down . . . in *Miranda* to safeguard that privilege." The *Miranda* warnings are not themselves a constitutional requirement but are "safeguards" designed to "provide practical reinforcement for the right against compulsory self-incrimination." *Id.* at 444.

[38] The facts in *Hass* bear strong resemblance to those in *Escobedo* v. *Illinois,* 378 U. S. 478 (1964), which was argued on a Sixth and Fourteenth Amendment theory. The right to counsel, which the defendant in *Hass* sought to effectuate under the Fifth and Fourteenth Amendments, is, of course, of equal constitutional dignity.

[k] (March 19, 1975) 43 U. S. L. Week at 4420.

We are not persuaded that factual distinctions between the instant case and *Harris* and *Hass* are sufficient to shift the balance struck in the two Supreme Court cases between impeachment of perjurious testimony and deterrence of improper police conduct. The exclusionary rules fashioned in *Miranda* and like cases[40] deter "impermissible police conduct" (see *Harris* v. *New York, supra,* at 225) by excluding from trial any evidence which was improperly obtained. *Michigan* v. *Tucker,* 417 U. S. 433, 447 (1974). Cf. *United States* v. *Calandra,* 414 U. S. 338, 347 (1974). An exception to the exclusionary rules in the instant case is no more an encouragement to such misconduct (or a slackening of the deterrent effects of the rules) than are the exceptions promulgated in *Harris* and *Hass*. Such encouragement may be

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[39] We emphasize the functional similarity of the rights at issue because the cases, though analogous, proceed on a variety of different theories. In the instant case, the defendant claims abridgment of rights under the Fifth, Sixth, and Fourteenth Amendments. *Hass* was decided on Fifth and Fourteenth Amendment grounds. The *Harris* opinion mentions only *Miranda* (and no specific constitutional amendment) and seems to foreshadow the description of *Miranda* warnings as prophylactic rules in *Michigan* v. *Tucker*. See n. 37, *supra*.

[40] Compare, however, the rationale for exclusion of coerced confessions given at p.   , *supra* (Mass. Adv. Sh. [1975] at p.

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thought to arise from the police officer's knowledge that a lawyer will likely advise his client to make no statement while in custody[41] and the further knowledge that a statement elicited in the absence of counsel will at least be available for impeachment of testimony.[42]. Yet, in *Hass,*[43] where the suspect had actually requested counsel and, thus, the incentive for continuation of interrogation without adherence to constitutional requirements, if there were an impeachment exception to the exclusionary rule, would be at a maximum, the court held that the interest in deterring such police conduct was outweighed by the general interest in impeachment of perjurious testimony. In the instant case, by contrast, the police could not know that the defendant would ask to see his attorney. If he had been informed that his attorney wished to see him, the defendant might have chosen to proceed without counsel — to reject the offer. After all the police had "given" the defendant his *Miranda* warnings. He was aware of the fact that his parents had engaged an attorney to represent him. It was open to him at any time to halt the inquiry and request the attorney. Instead, the defendant intermittently asked for his parents and continued to answer questions when they did not arrive. In view of the uncertainty in the defendant's response to the information that his attorney wished to see him, an exception to the exclusionary rule in the instant case presents lesser incentives to police misconduct than were present in *Hass,* and there is a correspondingly less substantial interest in an exclusionary rule for deterrence.

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[41] See the opinion of Jackson, J., in *Watts* v. *Indiana,* 338 U. S. 49, 59 (1949): "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances."

[42] In *Hass,* the Supreme Court termed this a "speculative possibility." *Oregon* v. *Hass, supra,* at ([March 19, 1975] 43 U. S. L. Week at 4420).

[43] In the interest of brevity, we limit our examination of the balancing test to *Hass*. However, we note that *Harris* also supports our holding here. See *United States ex rel. Wright* v. *LaVallee,* 471 F. 2d 123 (2d Cir. 1972), cert den. 414 U. S. 867 (1973); *United States ex rel. Padgett* v. *Russell,* 332 F. Supp. 41 (E. D. Pa. 1971).

Accordingly, we hold that, as in *Hass,* the interest in impeachment of perjurious testimony here outweighed the interest in deterrence of police misconduct and that those of the defendant's statements which were voluntary and trustworthy were properly available to impeach his testimony if he had taken the stand.

2. We think the judge was warranted in finding that the statements made by the defendant to the police at the hospital were voluntary.[44]

Having concluded that the defendant's post-4:15 P.M. statements to his abductors were separated from his earlier statements to them by a break in the stream of events and that these later statements were not made because the cat was out of the bag, we believe that the statements in the hospital were also sufficiently separated from the coercive conditions which had extracted the statements in the cabin and were also

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[44] There was no claim of involuntariness or coercion in either *Harris* v. *New York,* 401 U. S. 222, 224 (1971), or *Oregon* v. *Hass,* , (1975) ([March 19, 1975] 43 U. S. L. Week 4417, 4420). However, as noted above, in *Hass,* the Supreme Court wrote: "If, in a given case, the officer's conduct amounts to abuse, that case, like those involving coercion or duress, may be taken care of when it arises measured by the traditional standards for evaluating voluntariness and trustworthiness." *Id.* at ([March 19, 1975] 43 U. S. L. Week at 4420). We assume without deciding that in the circumstances of this case we would not distinguish involuntary admissions from involuntary confessions for purposes of impeachment. See *Commonwealth* v. *Harris,* Mass. , (1973) (Mass. Adv. Sh. [1973] 1379, 1384). Involuntary (and, hence, untrustworthy) confessions are not admissible to impeach a defendant's testimony. *Commonwealth* v. *Kleciak,* 350 Mass. 679, 690 (1966). *Commonwealth* v. *Harris, supra.*

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not the product of the cat-out-of-the-bag effect. The statements in the hospital were elicited by different people, police officers uninvolved in the original abduction, in a different place. See *Lyons* v. *Oklahoma*, 322 U. S. 596, 602 (1944). Cf. *Miranda v. Arizona*, 384 U. S. 436, 496 (1966).[45] By the time of his questioning in the hospital, the defendant had had an opportunity to consult his family (cf. *Reck* v. *Pate*, 367 U. S. 433, 441 [1961]) and had been out of the control of his captors for quite some time (cf. *Beecher v. Alabama*, 389 U. S. 35, 38 [1967]; *Darwin v. Connecticut*, 391 U. S. 346, 349 [1968]). It does not appear from the evidence that the statements in the cabin caused him to make admissions to the police. As noted above, the defendant did not believe his statements could be used against him. In the interrogation by police, he did not immediately confess, as might a man who felt he had nothing to lose. Rather, he maintained some control over the session and answered only selected questions.

Further, we believe that the trial judge found correctly that the police interrogation, itself, did not overbear the defendant's will and did not extract an involuntary statement from him. The trial judge found the following significant subsidiary facts on ample evidence. The defendant is an intelligent and educated young man. See *Commonwealth* v. *Pratt*, 360 Mass. 708, 713-714 (1972);* *Lisenba* v. *California*, 314 U. S.d 219, 239-241 (194). Cf., e.g., *Fikes* v. *Alabama*, 352 U. Sd. 191, 196 (1957); *Payne* v. *Arkansas*, 356 U. S. 560, 567 (1958). At the time of his interrogation, he was neither dazed nor bewildered (cf. *Leyra* v. *Denno*, 347 U. S. 556, 560 [1954]), nor drugged (cf. *Beecher* v. *Alabama*, 389 U. S. 35, 38 [1967]), nor too sick or weak to resist questioning (see *Commonwealth* v. *Sousa*, 350 Mass. 591, 598 [1966]; cf. *Reck* v. *Pate*, 367 U. S. 433, 443 [1961]; *Beecher* v. *Alabama, supra*). He was physically and mentally alert. Aside from the injury to his eye, he showed no evidence of physical disability or impairment of physical or mental functions. Before questioning commenced, the officers informed the defendant of his *Miranda* rights. See *Davis* v. *North Carolina,* 384 U. S. 737, 740 (1966); *Procunier* v. *Atchley,* 400 U. S. 446, 453 (1971). During the questioning, the police officers were courteous. They did not threaten the defendant (cf. *Harris* v. *South Carolina,* 338 U. S. 68, 70 [1949] [threat to the defendant concerning his mother]; *Beecher* v. *Alabama, supra,* at 36) or attempt to induce admissions by deception (cf. *Spano* v. *New York,* 360 U. S. 315, 323 [1959]). The questioning was not unduly lengthy or prolonged (cf. *Ashcraft* v. *Tennessee,* 322 U. S. 143, 153-154 [1944]; *Watts* v. *Indiana,* 338 U. S. 49, 53 [1949]; *Clewis* v. *Texas,* 386 U. S. 707, 709 [1967]) and, throughout the questioning, the defendant maintained the abovementioned control over the proceedings (see *Commonwealth* v. *Cook,* 351 Mass. 231, 235 [1966], cert. den. 385 U. S. 981 [1966]; *Stein* v. *New York,* 346 U. S. 156, 186 [1953]). At his insistence, the stenographer was dismissed. He did not answer every question, but chose those to which he would reply.

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[45] This is the discussion of *Westover* v. *United States*, one of the consolidated cases.

[1] Mass. Adv. Sh. (1972) 9, 14.

In these circumstances, we cannot say that the statements which finally emerged were involuntarily given. Accordingly, the statements were properly ruled available for impeachment of testimony under the rule of *Harris* and *Hass.*

IV. REVIEW PURSUANT TO G. L. c. 278, § 33E.

Having determined that there was no constitutional error in the admission of evidence at trial, we turn now to the additional review of the record and law which is our duty in all capital cases.[46] General Laws c. 278, § 33E, as amended

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[46] The statute defines a "capital case" as one in which "the defendant was tried on an indictment for murder in the first degree and was convicted of murder either in the first or second degree." G. L. c. 278, § 33E.

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through St. 1974, c. 457, provides in relevant part, "In a capital case . . . the supreme judicial court shall transfer to that court the whole case for its consideration of the law and the evidence. Upon such consideration the court may, if satisfied that the verdict was against the law or the weight of the evidence, or because of newly discovered evidence, or for any other reason that justice may require (*a*) order a new trial or (*b*) direct the entry of a verdict of a lesser degree of guilt, and remand the case to the superior court for the imposition of sentence." The statute "gives us the power and duty exercised by a trial judge on a motion for a new trial" (*Commonwealth* v. *Baker,* 346 Mass. 107, 109 [1963]) but also reserves for our consideration the broader issue whether the verdict rendered represents a miscarriage of justice or whether a lesser degree of guilt would be more consonant with justice. *Commonwealth* v. *Baker, supra. Commonwealth* v. *Williams,* Mass. , (1973).[m] See *Commonwealth* v. *Jones,* Mass. , (1975).[n] This latter power is a power which the trial court does not have. *Commonwealth* v. *Baker, supra. Commonwealth* v. *Bearse,* 358 Mass. 481, 485 (1970).

The record before us contains little direct evidence from which a finder of fact could construct an account of the events which immediately preceded the victim's death. There were no witnesses to the conversation and violence between the victim and the defendant. The jury undoubtedly reached their verdict, a verdict warranted by the evidence, by drawing a chain of inferences from the relationships among the witnesses, the defendant and the victim and from the defendant's statements and actions immediately before and simultaneously with the discovery of the body. The principal direct evidence concerning the killing, the defendant's admissions to members of the concerned group in the cabin and to the police in the hospital, was, of necessity, excluded from the trial and had no place in the jury's deliberations. This evidence, itself, is suspect because of the coercive circumstances in which the admissions were elicited (see *Jackson* v. *Denno,* 378 U. S. 368, 386-388 [1964]) and the subsequent implicit repudiation of the admissions by the defendant in his voir dire testimony.

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[m] Mass. Adv. Sh. (1973) 1245, 1250.

[n] Mass. Adv. Sh. (1975) 365, 371.

(Nevertheless, despite this relative paucity of reliable direct evidence concerning the victim's death, we believe that justice requires that we reduce the verdict of murder in the second degree to manslaughter. The thrust of the evidence is that the killing lacked the element of malice aforethought necessary to support a verdict of murder.)

[In reaching this conclusion, we rely in large measure on the account of the killing given by the defendant to the concerned group in the cabin. Although this evidence was correctly excluded from the jury's consideration, it may be considered by us in the exercise of our authority under G. L. c. 278, § 33E.][47] Cf. *Commonwealth* v. *Smith,* 357 Mass. 168, 182 (1970). To repeat (see p. , *supra*), the defendant's story was that, after an argument, the victim provoked him with a slap which he answered impulsively and angrily with a return blow. Her death then followed in an unexpected manner as she fell and hit her head on the curb. This version of the events

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[47] We have said repeatedly that the statute "requires us to consider the *whole case broadly* to determine whether there was any miscarriage of justice" (emphasis supplied). *Commonwealth* v. *Cox,* 327 Mass. 609, 614 (1951). Accord, *Commonwealth* v. *Gricus,* 317 Mass. 403, 407 (1944); *Commonwealth* v. *Baker,* 346 Mass. 107, 109 (1963); *Commonwealth* v. *Williams,* Mass. , (1973) (Mass. Adv. Sh. [1973] 1245, 1250). Moreover, G. L. c. 278, § 33E, provides specifically that this court may direct the entry of a verdict of a lesser degree of guilt "if satisfied that the verdict was against the law or the weight of the evidence . . . or for *any other reason* that justice may require" (emphasis supplied).

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will not support a finding of malice aforethought. The defendant never formed a specific intention to kill the victim. Rather, he struck in almost-reflexive response to her provocation, and such passion as he felt did not achieve the intensity of a desire to kill. Though the defendant undoubtedly intended to inflict some injury on the deceased, this intention was "palliated by the existence of . . . [the] mitigating circumstances" (*Commonwealth* v. *Mangum,* 357 Mass. 76, 85 [1970]) represented by the prior slap and provocation. Nor could death reasonably be expected to follow the defendant's blow. " '[A]ccording to common experience' " there is no " 'plain and strong likelihood that death will follow' " a simple blow with the hand administered to a healthy adult[48] — even if the victim is standing on slippery, rain-spattered pavement. See *Commonwealth* v. *Mangum, supra*; *Commonwealth* v. *Chance,* 174 Mass. 245, 252 (1899); *Commonwealth* v. *Gordon,* 307 Mass. 155, 158 (1940). Cf. *Commonwealth* v. *Gricus,* 317 Mass. 403, 411 (1944). Such a battery which causes death is manslaughter. *Commonwealth* v. *Sostilio,* 325 Mass. 143, 145 (1949). *Commonwealth* v. *Campbell,* 352 Mass. 387, 397 (1967). See, generally, Perkins, A Re-examination of Malice Aforethought, 43 Yale L. J. 537, 552-555 (1934).

[Although other reconstructions of the events of that night are possible and some will support a finding of malice, we have accepted the defendant's story, in so far as it precludes a finding of malice aforethought and suggests an accidental, unintended death, because it comports well with the other evidence concerning the defendant, the victim, and their relationship. The defendant appears to be a reasonably normal, mature and intelligent engineering student.[49] In his life prior to the evening of the victim's death,[50] he had not manifested any violent tendencies and had not had any prior involvement with the law. His ongoing realtionship with the victim was of some duration and was characterized, it seems, by reciprocal affection. Although the smooth continuation of the relationship was evidently disturbed by the victim's trip to California, her relationship with a man there, and the defendant's consequent jealousy, there is no evidence in the record that his feelings of jealousy had so overmastered his affectionate inclination toward the victim that he would at any time have considered taking steps to bring about her death. Certainly, there is no substantial indication[51] in the record that he went to their meeting that night with the premeditated intent to kill or to employ violence against the

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[48] "But where death ensues from acts or means which, under the circumstances, could not have been supposed to endanger life or to inflict great bodily injury, the law will not imply malice, because it cannot be reasonably inferred that the party charged intended the consequences which flowed from this act. If therefore death should ensue from an attack made with the hands and feet only, on a person of mature years and in full health and strength, the law would not imply malice, because ordinarily death would not be caused by the use of such means." *Commonwealth* v. *Fox,* 7 Gray 585, 588 (1856).

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[49] The judge below implicitly found this.

[50] Statements about the defendant's prior life must be limited by the state of the record, which is relatively uninformative in this respect. We assume the accuracy of the statements in the text in the absence of contrary information.

[51] At trial, the assistant district attorney termed the killing a "cold, calculated murder" and asked the jury to return a verdict of murder in the first degree. In support of his request, he directed the jury's attention specifically to the love beads worn by the victim (acquired while she was in California), to the lengths of rope which bound the body in two places, to the blanket in which the body was wrapped, to the grave in which the body was buried and to the defendant's silence for fifteen months about the circumstances of the victim's death. While these facts may support an inference of premeditation and preparation, they certainly do not provide substantial proof of an intentional killing.

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victim. Cf. *Commonwealth* v. *Kendrick,* 351 Mass. 203, 210-211 (1966). Further, there is no indication that their relationship had so deteriorated that he would have undertaken to kill or attack savagely the object of his affections even if he had been enraged at being asked to bear the consequences of her infidelity — a pregnancy. In the context of their relationship, the defendant's story of one hasty unfortunate blow rings true.]

The case is remanded to the Superior Court where the verdict of murder in the second degree and the sentence previously imposed are to be vacated. A verdict of guilty of manslaughter shall be entered and sentence shall be imposed thereon.

So ordered.

KAPLAN, J. (with whom Wilkins, J., joins, dissenting). The record of this case discloses a dangerous vigiliantism, not to be condoned even if it began out of understandable feelings of frustration. The response of the police detective in charge of the official investigation to these private activities was maladroit or worse.[1] Later, the same officer and others deliberately obstructed counsel's access to the defendant when the defendant had dire need of advice. At a trial following such events, constitutional protections should have been accorded to the accused with particular scruple. The able trial judge tried conscientiously to give the accused his constitutional due, but I think two of his rulings were faulty. The rulings were (I) the the statements made by the defendant to his kidnappers at the Sears parking lot around 6:30 P.M. on December 9, 1971, were voluntary and thus admissible, and (II) that the Commonwealth could use for impeachment purposes the statements made by the defendant to the police at the hospital early the following morning, at a time when the defendant's counsel was being kept from him by the police. Because the court upholds these rulings, I am obliged to dissent.

I

This case must be the first in our jurisprudence in which incriminating statements, made by a kidnapped person to his kidnappers while still in their grip, have been adjudged to be acts of free will. How does the court justify such an extraordinary conclusion here?

All members of this court accept the basic facts — the historical or subsidiary facts — as found below. The dispute is as to the conclusions to be drawn from those facts, a matter on which this court, as an appellate court dealing with constitutional rights, is required to make its own independent judgment. See *Commonwealth* v. *Murphy*, 362 Mass 542,

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[1] See. n. 9, *infra*.

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550-551 (1972)[a][2] (concurring opinion of Hennessey, J.); *Napue* v. *Illinois*, 360 U. S. 264, 271-272 (1959).[3] The majority of this court reach their conclusion by a train of reasoning that declines to acknowledge the natural inferences flowing from the subsidiary facts, and constructs instead a wholly speculative theory to explain the defendant's behavior.

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[a] Mass. Adv. Sh. (1972) 1679, 1685-1687.

[2] At part II, section 4, of its opinion, the court chides this dissent for refusing to accept the trial judge's findings and in effect adopting contrary findings. The criticism is misdirected and ignores constitutional requirements. As will be evident, we do indeed differ from the trial judge in his "finding" (quoted by the court) that the defendant was "completely free from fear." But to call that and similar statements by the trial judge subsidiary findings and thereby to foreclose reëxamination of them here would subvert the process of review in constitutional cases. Those statements are merely reformulations in other words of the judge's conclusion that the defendant acted voluntarily after 4:15 P.M., and are the very constitutional issue that must be reassessed by this court. Particularly pertinent is the closing remark in the following passage by Hennessey, J., concurring in the *Murphy* case, cited in the text: "[T]he *ultimate* findings and rulings of a judge may give rise to a meaningful appeal, even in a case where his subsidiary findings are beyond practical challenge. This is true because the ultimate conclusions of a judge on identification issues may be of constitutional proportions. This court must, where justice requires, substitute its judgment for that of a trial judge at the final stage. . . . The mere recital of appropriate phrases denoting constitutional acceptability may serve only to obscure error in admitting the evidence." 362 Mass. at 551 (Mass. Adv. Sh. [1972] at 1686). See Frankfurter, J., in *Watts* v. *Indiana*, 338 U. S. 49, 50-51 (1949), and *Culombe* v. *Connecticut*, 367 U. S. 568, 603-606 (1961).

[3] The court said in *Napue*: "The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate. *Martin* v. *Hunter's Lessee,* 1 Wheat. 304; *Cooper* v. *Aaron,* 358 U. S. 1. This principle was well stated in *Niemotko* v. *Maryland,* 340 U. S. 268, 271: 'In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of

That the statements given up to 4:15 P.M. of December 9 were coerced, is not disputed. But we have to sum up the circumstances of that coercion because they bear on the defendant's situation when he made the further statements two hours later.

A large number of hostile pursuers, all the more fearsome because not quite identifiable, had been harrassing the defendant over a period of fifteen months, making threatening appearances at unpredictable times at his home, school, and places of work. The insistent surveillance broke out into episodes instinct with violence. Toward the end the defendant would have ground for believing that his tormentors had already convicted him of murder and sought only an opportunity to enforce their own law. Finally came the kidnapping at Mt. Ida. The physical hurt was compounded by the uncertainties of a long trip to an unknown destination. Arrival in the dead cold of winter at an isolated, snowbound place must further have shaken the defendant. The threat of the bread knife was upon him throughout the night.

Starting in the early morning and for some six to eight hours the defendant was questioned by three and then five antagonists whose determination to break him may have been intensified by an apprehension that they could not "justify"

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lower courts, but will reexamine the evidentiary basis on which those conclusions are founded.' It is now so well settled that the Court was able to speak in *Kern-Limerick, Inc.*, v. *Scurlock*, 347 U. S. 110, 121, of the 'long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest.' As previously indicated, our own evaluation of the record here compels us to hold that the false testimony used by the State in securing the conviction of petitioner may have had an effect on the outcome of the trial." See *Drope* v. *Missouri*, U.S. (1975) ([February 19, 1975] 43 U. S. L. Week 4248, 4252).

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the kidnapping, if called to account for it, unless they managed to extract some tangible results. This may have underlain the severity of the questioning: in any event, it was extended, repetitious, nagging, interspersed with extremely rough language and threats to take the defendant's life, threats that he would never leave the place alive. In confronting this inquisition, the defendant was alone, without benefit of friends or advice. At length, the defendant's will was broken. He made incriminating statements to Ferreri and Campbell.

It is conceded that these statements were coerced. But the defendant still withheld the revelation of the exact location of the body. Instead he offered to lead Ferreri to the gravesite. The kidnappers debated the defendant's offer; only after argument among themselves (Ferreri pressing one view and Fontacchio and Heard the other) did they decide to accept the offer and take the defendant with them to Boston, rather than to continue to hold him at the cabin until he revealed the location of the gravesite and the information could be verified. But the defendant was not to be released until the body was found. Thus, the kidnapping and imprisonment were not brought to an end by the defendant's initial statements at the cabin, but would continue until he satisfied his captors' ultimate demand. On these facts, I conclude that the defendant's acceptance of the condition that he reveal the gravesite was as much coerced as his initial statements. His statements at the Sears parking lot were thus made within a continuing constraint and compulsion.[4]

In light of the natural conclusion from the subsidiary facts that the defendant remained under the heel of the kidnappers through the 6:30 P.M. statements, it may be unnecessary to apply those tests which have been used in more doubtful cases to measure how far coercion or illegality has been attenuated by later events. But if those tests are applied here, the conclusion is reinforced.

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[4] See the distinction suggested in *Commonwealth* v. *McGarty*, 323 Mass. 435, 438 (1948), between an officer's saying to a suspect during questioning that he will not be beaten, and the officer's saying he will not be beaten if he confesses to the crime. See also *Commonwealth* v. *Femino*, 352 Mass. 508, 514 (1967).

As to whether there has been an insulating "break in the stream of events" between successive statements, the cases point to certain central, objective considerations. Among these — besides the elementary question of the length of time between the statements, here quite short — are the factors: whether in the interval the defendant had an opportunity to see his family or friends (*Reck* v. *Pate,* 367 U. S. 433, 444 [1961]), or to consult with counsel (*Darwin* v. *Connecticut,* 391 U. S. 346, 349 [1968]; *Clewis* v. *Texas,* 386 U. S. 707, 709, 711 [1967]); whether he has been throughout the period continuously in the hands of those who obtained the first statement (*Beecher* v. *Alabama,* 389 U. S. 35, 38 [1967]); and whether the later statement was given to the same persons as the original, coerced statement. (*Lyons* v. *Oklahoma,* 322 U. S. 596, 604 [1944].) According to these objective indicators, there is no basis for discovering here a material break in the stream of events.

Next, as to "cat-out-of-the-bag," we observe that by 4:15 P.M. the defendant had already made statements involving himself in the death of the victim; he had not divulged the exact location of the grave, but he had given up its approximate location. The main secret was out. There is nothing to suggest that the defendant knew that under the law his statements to that point were inadmissible; indeed, such mention as the defendant is supposed to have made of his chances in case of trial indicate that he thought his statements could and would be used against him. But if he believed that his first statements were beyond recall — and realistically they were, regardless of their exact legal position at trial — the defendant would see little point in withholding the rest of his story. So the conclusion is well justified that the coercion which produced the pre-4:15 P.M. statements was also the cause of the post-4:15 statements. And here, to repeat, we have the added, overriding factor that the defendant was under great continuing pressure to make the final disclosure of the gravesite as a means of getting free of the kidnappers.

My assessment of the subsidiary facts seems to me within the reasoning of the passage from Mr. Justice Jackson in *United States* v. *Bayer,* 331 U. S. 532, 540 (1947), and the remarks by Mr. Justice Harlan in *Darwin* v. *Connecticut*, 391 U. S. 346, 350-351 (1968), quoted by the court.[5] Again, in *United States* v. *Gorman,* 355 F. 2d 151, 157 (2d Cir. 1965), cert. den. 384 U. S. 1024 (1966), the Second Circuit considered a "situation in which, after a first confession has been extracted from a man previously professing innocence by means calculated to break his will, a second confession is more politely secured." Judge Friendly wrote, "In such a case, there is a strong basis both in logic and in policy for drawing the inference that the second confession was the product of the first, and for permitting that inference to be overcome only by such insulation as the advice of counsel or the lapse of a long period of time." Compare *Fisher* v. *Scafati,* 439 F. 2d 307, 310-311 (1st Cir. 1971), cert. den. 403 U. S. 939 (1971), where Chief Judge Aldrich suggested that *Miranda* warnings after a first invalid confession may not themselves make a second confession admissible unless accompanied by advice about that prior invalidity and inadmissibility.[6]

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[5] See, further, Stewart, J., in *Harrison* v. *United States,* 392 U. S. 219, 224-226 (1968), and Harlan, J., dissenting in the same case and further explaining his position in the *Darwin* case. 392 U. S. at 227, note. See also *Ruffin* v. *United States,* 293 Atl. 2d 477, 480-481 (D. C. 1972).

[6] It may serve in some measure to explain the trial judge's error in admitting the post-4:15 statements, that in his original findings he omitted entirely to deal with the factor of "cat-out-of-the-bag" and paid insufficient attention to the factor of "break in the stream of events." Accordingly, this court entered an order directing the trial judge to address himself to these two factors. The judge's "supple-

There is analogy in a case decided by the Supreme Court last term, *Brown* v. *Illinois*, U. S. (1975).[b] After a warrantless arrest without probable cause, the defendant was given *Miranda* warnings and then, about 9 P.M., made an inculpatory statement. The defendant then went with the police to look for an alleged confederate, Claggett, and at 3 A.M. the next morning, after repeated *Miranda* warnings, gave a second statement. The court held that the illegal arrest vitiated the defendant's first statement despite the warnings: "Brown's first statement was separated from his illegal arrest by less than two hours, and there was no intervening event of significance whatsoever." U. S. at .[c] As to the second statement, the court said of it that it was "clearly the result and the fruit of the first." U. S. at .[d] "The fact that Brown had made one statement, believed by him to be admissible, and his cooperation with the arresting and interrogating officers in the search for Claggett, with his anticipation for leniency, bolstered the pressures for him to give the second, or at least vitiated any incentive on his part to avoid self-incrimination." U. S. at , n. 12.[e][7]

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mentary findings" do not add to the subsidiary facts and asseverate his earlier conclusions without adding any fresh appreciation of the defendant's predicament before or after 4:15 P.M.

[b] (June 26, 1975) 43 U. S. L. Week 4937.

[c] (June 26, 1975) 43 U. S. L. Week at 4942.

[d] (June 26, 1975) 43 U. S. L. Week at 4942.

[e] (June 26, 1975) 43 U. S. L. Week at 4942, n. 12.

[7] This court took a similar approach in *Commonwealth* v. *Spofford*, 343 Mass. 703 (1962), a case involving not the admissibility of a subsequent confession, but rather the effectiveness of a consent for a search, given after a prior illegal search had turned up incriminating evidence, as the defendant knew. We emphasized that, given the prior search and its consequences, the defendant was "in no environment to make a free choice," and held that the consent obtained was "an offshoot of the original unreasonable search and

In the present case, the problem for the trial judge, and for this court in following him, was how to reconcile a conclusion that the defendant's statements after 4:15 P.M. were voluntary, with (a) the earlier conceded coercion by the kidnappers, (b) the effect on the defendant's mental state of his having made the initial confession, (c) the determination by the kidnappers, well understood by the defendant, to hold the defendant until he completed his confession by revealing the gravesite, and (d) the kidnappers' possession and control of the defendant until he actually did so. The trial judge and the court have responded to this challenge by simply introducing a kind of *deus ex machina*: they assert that a sudden and complete change occurred after the initial statements; with the cessation of overt intimidation on the part of the kidnappers, the defendant abruptly became friendly and trustful toward them, so that his actions and statements thereafter were manifestations of his free will, uninfluenced by the previous coercion. In attempted support of this inference, the court seizes upon a number of incidents after 4:15 P.M. With occasion to cry out to the two hunters or at the toll stations on the way back to Boston, the defendant remained silent. Similarly, the defendant made no attempt to attract the attention of passersby at the parking lot, and did not seize any opportunities to escape that may have presented themselves while he was descending to the tracks and returning (with the advantage of the open penknife). It is said that the defendant warmed to Ferreri and spoke of those to whom he first confessed as his "friends," he took credit with Ferreri for not appealing to the hunters, and he contributed some change to pay a toll. Just before reaching the parking lot, he volunteered

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seizure" and so did not validate the subsequent search. 343 Mass. at 707, 708.

That *Brown* and *Spofford* both relate to an inquiry into the lasting effect of a Fourth Amendment violation, while the case at bar involves a Fifth Amendment violation, is of no consequence for our inquiry, as the court appears to recognize. See, *ante*, p.   , n. 32.

to Ferreri an indication of the bus stop figuring in his confession, and later talked easily to Heard about his legal chances. Even so, we encounter the fact that during the ride to Boston the defendant secretly unscrewed the door lock plunger on his side of the car in order to provide himself with physical proof that he had been kidnapped; he complained that the GTO automobile was bugged; and he resisted the walk down the path.

All this behavior does not lead to the inference that the defendant was free of compulsion or of its effects; on the contrary, his behavior is entirely consistent with a broken will and indeed is to be expected from one in that condition. As was said in a case where a defendant had been intimidated and beaten by private parties and shortly thereafter made statements to the police: "Torture destroys not only physically but psychologically. Elements of despair, fatigue, craving for companionship, identifying one's interrogator as friend and source of aid,[8] and suggestions of guilt were all present in a crude, haphazard form in this case." *People* v. *Berve,* 51 Cal. 2d 286, 292 (1958). It is all too easy, reading this record in retrospect, with control on one's faculties and with time and capacity to think clearly, to point out one or another moment when the defendant might have escaped. But such heroics are more likely in the movies than in real life. If the defendant had the ability to think of escape, he might also have thought that it would only result in recapture by the five vigorous young men or ultimately by others of the concerned group. In all probability, planning escape was out of the question for the defendant. Suffering from the bewildering and frightening events since his abduction, and already deeply committed by the pre-4:15 statements, he most likely was incapable of further resistance, though he might yet retain sufficient presence of mind for such sporadic acts as taking the door lock plunger. At the same time, the facts demonstrate that the defendant was not beyond some gestures to ingratiate himself with his tormentors; it may be inferred that he felt these a means of preventing further mistreatment or of gaining his final release. Once he had told his story, the "cat-out-of-the-bag" syndrome explains his telling it again, and his further remarks to Heard were nothing but self-comforting braggadocio. Any inference that the defendant was lighthearted after 4:15 P.M. because he thought the kidnappers accepted his story of a blow struck in anger, is dispelled when we note that, even if that statement were believed, the defendant would still be in very serious trouble: consider here his admission, as part of the story, that he had deliberately concealed the body, and then suppressed the truth for fifteen months.

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[8] This warming of the pursued toward his pursuer appears in imaginative literature in the relation of Jean Valjean to the detective Javert in *Les Misérables,* and of Raskolnikov to police inspector Porfiri Petrovich in *Crime and Punishment.*

In evaluating the historical facts to reach a conclusion, we should recall that it is not the defendant's burden to establish that his statements were coerced; the burden is on the government to prove the contrary, that the statements were freely willed. *Jackson* v. *Denno*, 378 U. S. 368, 376-377 (1964). *Lego* v. *Twomey*, 404 U. S. 477, 489 (1972). It is submitted that the inference of abrupt and total transformation of the defendant, from hostility and resistance to an attitude of voluntary coöperation, simply is not made out on the basis of the historical facts. Rather, the most modest conclusion that emerges from the facts is that the post-4:15 P.M. statements were substantially conditioned and influenced by the coercion directed at the defendant throughout the period during which he was held.

II

The police conduct surrounding the questioning of the defendant at the M. G. H. on the morning of December 10 violated the defendant's constitutional right to the assistance of counsel. The trial judge so held, and the court concedes the point. When the questioning began, Detective Gawlinski, in charge of the case,[9] knew that the defendant's counsel was trying to reach him. Yet he neither took steps to inform the defendant of that fact nor returned counsel's calls; instead he tried in a highly suspicious (if clumsy) way to conceal or avoid his responsibility for this breach of the Constitution by absenting himself from the interrogation that he knew to be going on.[10] There was, then, in the words of the trial judge, "a course of conduct calculated to circumvent . . . [the defendant's] constitutional rights," conscious "treading on constitutional thin ice," "deception and circumvention" by the principal investigating officer.

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[9] Gawlinski's earlier connection with the case sheds light on his actions and motivation during the hospital interrogation.

Gawlinski knew of the extensive surveillance of the defendant by the concerned group and he also became aware of the exacerbated incidents such as the one at Henry F. Bryant & Son, Inc., which ended in a physical encounter, with Ferreri or Fontacchio saying, "George, we know what you did and you're going to pay for it," and "You think you got away with it this time but you didn't — we'll get you," or words to that effect. Yet Gawlinski took no decisive action against any of this activity. His attitude is further illustrated by an incident that occurred in July, 1971. Arthur M. Pascal, a private investigator employed by the father of the victim, learned that Erwin Katz, a "concerned" person, was planning to "pick up" or "kidnap" the defendant for questioning at which the father would be present. Pascal called Gawlinski to ask whether Gawlinski had given Katz the "green light" (as Pascal had been told by others); Pascal pointed to the danger of violence by the father. Gawlinski indicated that he knew what was going to be done, yet insisted simply that there should be no "rough stuff"; if there was, he said, he would prosecute. The illegality and violence latent in the entire situation might have been more evident to an independent police officer. Gawlinski's independence, however, had been impaired by his too close association with the father and brother; it is symptomatic that Gawlinski's many meetings with the father took place at the father's residence rather than in official quarters. Gawlinski's hunger for results — for leads from any source — evidently overcame his respect for legality and orderly behavior. It comes, then, as no surprise that Gawlinski engineered to prevent the defendant from see his counsel on the morning of December 10.

Nevertheless, the trial judge ruled that the statements obtained at the hospital could be used for impeachment purposes if the defendant testified in his own defense, and the court affirms. I think the ruling is not required by the decided cases and is fundamentally wrong. I could, with some difficulty, sympathize with such a decision if the violation of constitutional right involved was accidental or of a minor or technical nature. Here it was deliberate and of serious consequence.

The court rests its conclusion on two cases, *Harris* v. *New York,* 401 U. S. 222 (1971), and *Oregon* v. *Hass,* U. S. (1975).[f] Neither is a sufficient prop. In *Harris* (a five to four decision), the Supreme Court held that, notwithstanding the failure of the police to give full *Miranda* warnings (Harris was told of his right to counsel, but not of his right to court-appointed counsel), a statement obtained during custodial interrogation could be used for impeachment when Harris testified in his own behalf at trial. Weighing the promotion of truth through allowing the impeaching use of the statement, against the possible added deterrence of police misconduct that would flow from denial of such use, the court thought the truth-seeking interest prevailed. It is a ground for distinguishing the *Harris* case from the present that *Harris* did not involve the direct violation of a constitutional right but only the violation of a prophylactic rule safeguarding the right.[11] Beyond that, however, it is vital to observe that the questioning in *Harris* took place before *Miranda* was decided, so that the violation of the defendant's right was unintentional.

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[10] In fact, Detective Sheehan, who did participate in the interrogation, also knew that counsel had been trying to reach Gawlinski.

[f] (March 19, 1975) 43 U. S. L. Week 4417.

We followed *Harris* v. *New York* in *Commonwealth* v. *Harris,* Mass. , - (1973).[g] In doing so, we took note of the objections raised by the dissenters in *Harris* v. *New York,*[12] and quoted from *Riddell* v. *Rhay,* 404 U. S. 974, 976 (1971) (Douglas, J., dissenting from denial of certiorari): "[T]he possible use of tainted statements . . . opens the door to a calculated risk by police interrogators." The risk referred to is that involved in intentionally violating constitutional rights in hopes that damaging statements will be obtained useful for impeachment. We said, "The present case does not require us to enter into this dispute. . . . [T]he record is entirely barren of any indication that police or prosecutor took any 'calculated risk'; there seems rather to have been an inadvertent defect in the *Miranda* warnings given." Thus it is evident that neither *Harris* v. *New York* nor our own *Commonwealth* v. *Harris* reaches the present case which is the paradigm of police deliberateness and calculation in infringing constitutional rights.

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[11] See *Michigan* v. *Tucker,* 417 U. S. 433, 443-444 (1974); *Michigan* v. *Payne,* 412 U. S. 47, 53 (1973).

[g] Mass. Adv. Sh. (1973) 1379, 1382-1383.

[12] See *Harris* v. *New York,* 401 U. S. at 226-232 (Brennan, J., dissenting). Adverse commentary on the Supreme Court's decision in *Harris* was copious and severe. See, e.g., Dershowitz & Ely, Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority, 80 Yale L. J. 1198 (1971); The Supreme Court, 1970 Term, 85 Harv. L. Rev. 40, 44 (1971); 10 Duquesne L. Rev. 128 (1971); 40 Fordham L. Rev. 394 (1971); 45 Temple L. Q. 118 (1971); 33 Pitt. L. Rev. 135 (1971).

The court argues also from *Oregon* v. *Hass.* That case posed the question (in the words of the Supreme Court): "When a suspect . . . states that he would like to telephone a lawyer but is told that this cannot be done until the officer and the suspect reach the station, and the suspect then provides inculpatory information, is that information admissible . . . for impeachment purposes . . .?" U. S. at (1975).[h] The Supreme Court held (six to two) that it was admissible, as long as no "abuse" occurred making the statement involuntary or untrustworthy. Hass was arrested at his home for bicycle theft, and, after full *Miranda* warnings, agreed to show the police where he had left the bicycle. "[The police officer] and Hass then departed in a patrol car for the site. . . . On the way Hass opined that he . . . would like to telephone his attorney. . . . [The officer] replied that he could telephone the lawyer 'as soon as we . . . [get] to the office.' . . . Thereafter . . . [Hass] pointed out a place . . . where the bicycle was found." U. S. at .[i]

The Supreme Court avoided characterizing the police violation of Hass's rights as either accidental or deliberate. If the sketchy facts are read as implying that the police acted in good faith, or at least without design to evade the Constitution, then the case is like *Harris* v. *New York* and, like that case, does not reach the present situation. Two recent Supreme Court cases, decided since *Harris* v. *New York,* suggest that *Hass* should be so interpreted.

In *Michigan* v. *Tucker,* 417 U. S. 433 (1974), a defendant, not informed of his right to appointed counsel, made a statement which led the police to a witness. In holding that the witness was properly allowed to testify, Mr. Justice Rehnquist wrote that "[w]e consider it significant to our decision in this case that the officers' failure to advise respondent of his right to appointed counsel occurred prior to the decision in *Miranda.*" He explained that "[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." 417 U. S. at 447. See the discussion of the case at 27 U. of Fla. L. Rev. 302, 309-310 (1974).

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[h] (March 19, 1975) 43 U. S. L. Week at 4417.

[i] (March 19, 1975) 43 U. S. L. Week at 4417.

Emphasis on the importance of good-faith behavior of the police, as a factor in decision as to admitting or rejecting a suspect's statement, appears also in *Brown* v. *Illinois,* U. S. (1975).[j] This came three months after *Hass*; both were written by Mr. Justice Blackmun. Setting out the considerations with regard to admitting or excluding a statement made after an arrest which violated the Fourth Amendment, the Justice said that the giving of *Miranda* warnings after the arrest was "an important factor . . . [b]ut . . . [t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances . . . and, particularly, the purpose and flagrancy of the official misconduct are all relevant." U. S. at - .[k][13] It seems unlikely that a

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[j] (June 26, 1975) 43 U. S. L. Week 4937.

[k] (June 26, 1975) 43 U. S. L. Week at 4941-4942.

[13] The concurring opinion of Mr. Justice Powell, in which Mr. Justice Rehnquist joined, developed at some length the distinction between "technical" and "flagrant" violations of the Fourth Amendment and the consequences of the distinction on the admission or exclusion of statements later given. U. S. at ([June 26, 1975] 43 U. S. L. Week at 4944).

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court which singled out for emphasis "the purpose and flagrancy of the official misconduct" in one case analyzing whether an exclusionary rule should be applied, would totally ignore the presence of purposeful and flagrant misconduct in another case also dealing with exclusion. Thus the failure of the *Hass* majority to weigh the deliberateness and seriousness of the police conduct in the case before it suggests that they believed no deliberate police misconduct — or at least no very invidious deliberate police misconduct — was present.[14]

Presumably this court disagrees and sees in *Hass* more than a casual misprision in that the police continued the patrol car on its course to the area of the crime, rather than turning it back to the station, at the moment when the suspect stated his desire for counsel. This court then takes the *Hass* case a step further and reads it as covering also as aggravated a situation as we find in the case at bar.

Hass, if interpreted to cover intentional interference by the police with suspects' access to counsel, would encourage the most objectionable kind of "risktaking" by the police. Mr. Justice Jackson said that any qualified lawyer will tell a suspect not to give a statement to the police.[15] Hence, faced with an attempt by a suspect to see a lawyer, as in *Hass*, or of a lawyer to see his client, as here, the police will have a choice: if they accede and allow a meeting with counsel, they will be obeying the Constitution, but they will get no statement from the suspect; if they deliberately prevent the contact, they will be scorning the Constitution, but they will have the chance of getting a statement from the suspect that can be used to impeach (and may have other practical uses). In sum, the police will have nothing to lose, and much to gain, by intentionally flouting the Constitution.[16] A rule of law presenting such a temptation to the police is radical and unwise.

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[14] The flagrancy of official misconduct as a determinant of whether a statement should be suppressed is also adopted by A.L.I.'s Model Code of Pre-Arraignment Procedure (1975 Approved Draft). In § 150.3 (1) and (2), the Code takes the position that "[a] motion to suppress a statement . . . [obtained in violation of the Code's procedural protections which include right of access to counsel] shall be granted . . . if the court finds that the violation upon which it is based was substantial . . .. A violation shall . . . be deemed substantial if . . . [t]he violation was gross, wilful and prejudicial to the accused. . . ." According to § 150.3 (3), a violation, not meeting the foregoing test, may nevertheless be found substantial if it satisfies another definition of which material elements are "the extent of deviation from lawful conduct," and "the extent to which the violation was wilful."

[15] *Watts* v. *Indiana*, 338 U. S. 49, 59 (1949) (Jackson, J., concurring in part and dissenting in part).

It is said that permitting impeaching use of the statement furthers the truth-seeking function because only defendants bent on perjury will refrain from taking the stand through fear of being impeached. But the rule would in practice operate also against suspects who are trying to tell the truth throughout. Even one attempting to be as truthful as possible may recall certain facts incorrectly or fail to recall other important ones: the time after arrest is confused and pressure-filled; there is indeed a subtle coercion that is inherent in all police interrogation. That a defendant at trial tells a story not on all fours with his prior statement to the police does not mean that he is committing perjury, but the inconsistency evident to the trier may nevertheless be devastating to the defendant's case.

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[16] The egregiousness of *Hass*, if it is taken to extend to permitting the use for impeachment of statements gained by deliberate denial of the right to counsel, is shown by comparing it with a rule that would apply *Harris* v. *New York* to allow impeaching use of statements gained by deliberate denial of proper *Miranda* warnings. If the latter rule were in force, the police would still have significant incentive to give the warnings, since many suspects give statements, which are fully admissible, after being given warnings. But in the situation of deliberate denial of the right to counsel there is no deterrence whatever of the illegal police conduct, since, as noted, an attorney if given access to his client will advise him to make no statement.

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The possibility of initial error by even a conscientiously truthful suspect and the later embarrassment at trial are reasons why counsel will advise his client to remain silent and not to accommodate the police. All this very much qualifies the notion that allowing the impeaching use will further the search for truth.[17]

This court is, of course, at liberty to adopt a higher standard than that which the Supreme Court has applied to the States under the Federal Constitution. See *Cooper* v. *California,* 386 U. S. 58, 62 (1967). If, indeed, the *Hass* case goes so far as to hold that a statement obtained from a suspect by deliberate and calculated police obstruction of his right to counsel may be admitted for impeachment purposes at a State court trial, then we should decline to adopt such a rule and we should hold, instead, as a matter of Massachusetts law, that the statement is inadmissible for any purpose. It is instructive that at least two States have already rejected the milder doctrine of *Harris* v. *New York* and have imposed upon themselves a rule more protective of the accused. See *State* v. *Santiago,* 53 Hawaii 254 (1971); *Commonwealth* v. *Triplett,* Pa. (1975).[1] See also, e.g., *State* v. *Brown,* 262 Ore. 442 (1972) (interpreting State Constitution's double jeopardy clause independently of Federal Constitution); *People* v. *Brisendine,* 13 Cal. 3d 528 (1975); *State* v. *Kaluna,* 55 Hawaii 361 (1974) (both interpreting State constitutional protection against unreasonable search and seizure to be broader than the guaranty found in the Federal Constitution by the decisions of *United States* v. *Robinson*, 414 U. S. 218 [1973], and *Gustafson* v. *Florida*, 414 U. S. 260 [1973]).

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[17] Compare *United States* v. *Hale,* U. S. (1975) ([June 23, 1975] 43 U. S. L. Week 4806), forbidding the prosecutor from asking a defendant why he did not tell the police at the time of his arrest the facts amounting to alibi that he testified to at trial. The *Hale* court reasoned that the inference the jury could draw — that the alibi was a contrivance — was so prejudicial to an honest defendant that questioning on the point must be forgone even though it might expose a perjurer.

[1] (May 13, 1975) 17 Crim. L. Rep. 2246.

To conclude: The lawlessness of the "concerned group" is here matched by official lawlessness. Both brands of anarchic behavior deserve solemn rebuke. Out of the welter came a trial so beset by error that the conviction should be reversed and judgment entered for the defendant.

HENNESSEY, J. (dissenting). I dissent. I cannot concur with the majority of the court in its conclusion that the defendant's admissions made in and near the Sears parking lot subsequent to 4:15 P.M. on December 9, 1971, were properly received in evidence. Although it is clear from the record that the trial judge conducted the proceedings with extraordinary competence and thoroughness, and with full appreciation of the constitutional issues, I do not believe that his ruling which permitted the introduction of the evidence was constitutionally permissible. Due process of law required the exclusion of the evidence.[1] Neither can I concur entirely in the reasoning of Justice Kaplan, as to this issue, in his dissenting opinion.

As to the second principal issue, whether the defendant's statements to the police at the hospital were admissible in evidence, I disagree with the majority and I concur with the conclusion and reasoning of Justice Kaplan in his dissenting opinion, viz.: that this evidence was not admissible even for the limited purpose of impeachment of the defendant.

1. In light of some of the differences between the majority view and the dissent of Justice Kaplan, particularly as expressed in Part II, section 4, of the majority opinion, I feel compelled to explore the standards of appellate review which

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[1] Both the majority opinion and the dissenting opinion of Justice Kaplan express special concern for the threat to individual rights inherent in vigilantism. This is not to say that the defendant's rights are any greater because he was a victim of private persons rather than police officers (compare the statement by Kaplan, J., *supra*, that "constitutional protections should have been accorded to the accused with particular scruple"). Nevertheless, it is a fair inference that the threat of vigilantism to constitutional rights is particularly acute at this time of greatly increased violent crime and resulting widespread fear and frustration. It is worth noting that several of the most popularly received recent books and moving pictures dealt with (and, it can be contended, glorified) violent self-help of the kind shown in the instant case.

should be applied by this court on issues such as are presented here. It is necessary to decide what standards are appropriate, not only in the hope of reaching the correct result in this case, but also for the sake of evenhanded justice in similar appeals. This court must have regard for two obligations in particular: its responsibility as an appellate court to reverse for errors of law, and its responsibility to defer where appropriate to findings of fact as made by the triers of fact at the trial level.

A defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, on an involuntary confession. *Rogers* v. *Richmond,* 365 U. S. 534, 540-541 (1961). The defendant here presses the constitutional issue by motions to suppress his admissions from evidence. These motions, and the inherent voluntariness issue, like all questions as to the admissibility of evidence, were for the judge's (not the jury's) determination. *Lego* v. *Twomey,* 404 U. S. 477, 489-490 (1972).[2]

In order to meet the constitutionally required standards of admissibility the burden is on the Commonwealth to prove, at least by a preponderance of the evidence, that a confession was voluntary. *Lego* v. *Twomey,* 404 U. S. 477, 489 (1972).[3]

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[2] The evidentiary and constitutional question of voluntariness is not to be confused with the issue of reliability (truth or falsity) of the confession, which is for the jury's decision. See *Jackson* v. *Denno,* 378 U. S. 368, 385-386 (1964); *Lego* v. *Twomey*, 404 U. S. 477, 484-485 n. 12 (1972). Also, we note that the Massachusetts rule that the voluntariness issue is to be submitted to the jury, if the judge first finds voluntariness after a hearing, is not of constitutional dimensions. See *Commonwealth* v. *Valcourt,* 333 Mass. 706, 710 (1956); *LaFrance* v. *Bohlinger,* 499 F. 2d 29, 35-36 (1st Cir. 1974), cert. den. sub nom. *LaFrance* v. *Meachum,* 419 U. S. 1080 (1974).

[3] Similarly, the burden of proof is on the government to establish the reasonableness of a warrantless search (*Chimel* v. *California,* 395 U. S. 752, 756 [1969]), and to prove reasonableness at least by a preponderance of the evidence. *United States* v. *Matlock,* 415 U. S. 164, 177-178 n. 14 (1974).

The question whether a confession was voluntarily given and rightly admitted presents a two-step analysis for an appellate court. First, the appellate court must determine whether the trial court's subsidiary findings of fact are supportable in evidence, and are warranted. Second, and of crucial importance, assuming the findings are warranted, the appellate court must *independently* determine whether admission of a confession is constitutionally permissible *on the facts as found and accepted*.

Where the facts are disputed, the resolution of such conflicts is for the judge and the appellate court must accept his findings. It is not for the reviewers to reconsider decisions of fact, since those decisions concern appraisals of the credibility of witnesses. This author, in a concurring opinion in *Commonwealth* v. *Murphy*, 362 Mass. 542, 550 (1972,[3][4] phrased it this way: "We cannot properly be asked to revise a judge's subsidiary findings of fact, where they are warranted by the evidence, or to review the weight of the evidence related to the findings." Like the United States Supreme Court, this court "does not sit as in *nisi prius* to appraise contradictory factual questions." *Ker* v. *California*, 374 U. S. 23, 34 (1963).

However, the appellate court is bound to review the ultimate conclusions of a judge where those conclusions are of constitutional moment. This author expressed it this way in the concurring opinion in the *Murphy* case, *supra:* "[T]he *ultimate* findings and rulings of a judge may give rise to a meaningful appeal, even in a case where his subsidiary findings are beyond practical challenge. This is true because the ultimate conclusions of a judge on identification issues may be of constitutional proportions. This court must, where justice requires, substitute its judgment for that of a trial judge at the final stage. . . . The mere recital of appropriate phrases denoting constitutional acceptability may serve only to obscure error in admitting the evidence." 362 Mass. at 551 (1972).[b]

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[3] Mass. Adv. Sh. (1972) 1679, 1685.

[4] Both the majority opinion and Justice Kaplan's dissenting opinion in this case refer to this concurring opinion in the *Murphy* case. See in particular n. 2 of Justice Kaplan's dissent.

Mr. Justice Harlan, quoting from *Watts* v. *Indiana*, 338 U. S. 49, 51-52 (1949), expressed the principle as follows: "[T]here has been complete agreement that any conflict in testimony as to what actually led to a contested confession [or to a contested arrest] is not this Court's concern. Such conflict comes here authoritatively resolved by . . . [the trial judge]" (citations omitted). *Beck* v. *Ohio*, 379 U. S. 89, 100 (1964) (Harlan, J., dissenting).

2. Examining the ultimate issue of voluntariness here, I conclude that the admissions[5] of the defendant, including his statements made subsequent to 4:15 P.M., should have been excluded. I accept, as I must and should, the judge's subsidiary findings of fact in their entirety, since these findings were adequately supported in the evidence. However, on the basis of the findings, in my view it cannot constitutionally be concluded that the Commonwealth has sustained its burden of proving voluntariness.

The judge found that the defendant was assaulted, kidnapped, threatened, and interrogated for hours. He was in captivity for at least twenty hours between the early evening of December 8, 1971, and the late afternoon of December 9, 1971. He was isolated from family, friends and counsel.

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[b] Mass. Adv. Sh. (1972) at 1686.

[5] I note that neither the majority opinion nor the dissenting opinion makes any point of distinguishing "admissions" from "confessions" in the constitutional context concerned here. In this I concur; it would be specious to indulge in variant reasoning or results based on such a distinction.

Although there was opportunity for him to escape during approximately the last two hours of this time, in my view an inference of voluntariness is not warranted even as to his admissions during those final few hours. I believe this conclusion inescapably follows from an application of the "stream of events" and "cat-out-of-the-bag" reasoning as carefully explored by Justice Kaplan in his separate dissenting opinion.

It follows that I cannot accept the contention of the majority that this court is bound by the judge's ultimate conclusion of voluntariness, or any inference of his that is synonymous with voluntariness or so broad as necessarily to import a conclusion of voluntariness (e.g., the finding that the defendant was "completely free from fear" after his encounter with the hunters).

Considering all the circumstances of the more than twenty hours of captivity, and accepting all the judge's subsidiary findings, I do not believe the case permits a conclusion that the Commonwealth has proved by a fair preponderance of the evidence that the defendant's statements at any time on December 9 were free of the influence of duress, fear and hopelessness caused by his captors.

The ultimate conclusion as to voluntariness requires the application of constitutional principles to facts. It is a conclusion which partakes of policy considerations and as such "is not a matter of mathematical determination. Essentially it invites psychological judgment — a psychological judgment that reflects deep, even if inarticulate, feelings of our society." *Haley* v. *Ohio*, 332 U. S. 596, 603 (1948) (Frankfurter, J., concurring).

As was stated in *Lyons* v. *Oklahoma*, 322 U. S. 596, 602 (1944), a case involving the voluntariness of a second confession given twelve hours after a first coerced confession, "The question of whether those confessions subsequently given are themselves voluntary depends on the inferences as to the continuing effect of the coercive practices which may fairly be drawn from the surrounding circumstances. . . . When conceded facts exist which are irreconcilable with such mental freedom, regardless of the contrary conclusions of the triers of fact, whether judge or jury, this Court cannot avoid responsibility for such injustice by leaving the burden of adjudication solely in other hands."

However, although I concur with Justice Kaplan that the admissions of the defendant should have been excluded, I cannot concur in his entire reasoning. It is neither necessary nor desirable for this court to reach affirmative findings of fact, substantially contrary to the findings of the trial judge.[6] Nor is it significant that some of these findings were so broad as to approach the ultimate constitutional conclusion; they were affirmative, substantially contrary to the judge's findings, and unnecessary. Such a process (of making findings at the appellate level) is markedly different from concluding, as I have, in light of where the burden of proof lay, that certain inferences drawn by the trial judge were not warranted on the facts as found by him. Also, such a process is significantly different from concluding, as I have, that the Commonwealth has failed to sustain its burden of proof on the issue of voluntariness. Our hope for evenhanded disposition of such difficult matters, free of appellate whim, requires that we not encroach on the trial judge's function.[7]

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[6] See, e.g., in Justice Kaplan's dissenting opinion, *supra*, the following findings: "On these facts, I conclude that the defendant's acceptance of the condition that he reveal the gravesite was as much coerced as his initial statements"; "His statements at the Sears parking lot were thus made within a continuing constraint and compulsion"; "[T]he defendant remained under the heel of the kidnappers through the 6:30 P.M. statements"; "So the conclusion is well justified that the coercion which produced the pre-4:15 P.M. statements was also the cause of the post-4:15 statements"; "And here, to repeat, we have the added, overriding factor that the defendant was under great continuing pressure to make the final disclosure of the gravesite as a means of getting free of the kidnappers"; "[H]is further remarks to Heard were nothing but self-comforting braggadocio"; "Rather, the most modest conclusion that emerges from the facts is that the post-4:15 P.M. statements were substantially conditioned and influenced by the coercion directed at the defendant throughout the period during which he was held."

3. I concur in Justice Kaplan's dissenting reasoning that the statements of the defendant to the police at the hospital should have been excluded, even for impeachment purposes. I do not believe that *Harris* v. *New York,* 401 U. S. 222 (1971), stands for the proposition that wilful violations by the police of the defendant's right to counsel, such as occurred in the instant case, permit the use of the resulting product of the interrogation for any purpose. See in particular 401 U. S. at 226-232 (Brennan, J., dissenting). Nor do I believe that *Oregon* v. *Hass,* U. S. (1975),[c] sufficiently modified the holdings of the *Harris* case to permit the result reached here by the majority.

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[7] Concededly other courts, including the Supreme Court of the United States, have approached some cases substantially as Justice Kaplan has treated this one.

[c] (March 19, 1975) 43 U. S. L. Week 4417.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
No. 62578

COMMONWEALTH OF MASSACHUSETTS
V.
GEORGE W. MAHNKE

Paper #21

FINDINGS OF FACT AND RULINGS OF LAW ON DEFENDANT'S MOTIONS TO SUPPRESS EVIDENCE

The defendant, George W. Mahnke, in the above-entitle cause seeks to suppress statements which he alleges were obtained involuntarily from him through threats, coercion, and violence. He has filed four motions which in the transcript are identified as: Motion to Suppress #1, identified in substance as a motion to suppress certain statements alleged to have been made to private persons after the defendant had been forcibly kidnapped; Motion #2 as it appears in the transcript is a motion to suppress certain statements allegedly made by the defendant to the police at an interrogation which took place at the Massachusetts General Hospital on December 10, 1971; Motion #3 is closely aligned to Motion #1 and seeks to suppress evidence and statements and actions leading to the discovery of the body of the deceased victim in back of the Sears & Roebuck retail store in the Fenway in the early evening of December 9, 1971; and a motion to suppress identified as Motion #4 in the transcript seeking to suppress certain statements made to the Boston Police at Division 4 of the Boston Police Department on September 16 and 17, 1970, on September 24, 1970, and on December 22, 1970. The defendant claims that the aforesaid statements and evidence (the events leading to the discovery of the body) were obtained illegally and unconstitutionally and the admission of such statements at his trial would violate the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution.

For purposes of clarity, Rhonda Bornstein mysteriously disappeared in the early evening of September 15, 1970, and on December 9, 1971 her body was discovered under circumstances hereinafter set forth which indicated that she had come to a violent death. She had been missing approximately fifteen months prior to the discovery of her body and was so listed in the records of the Boston Police Department as a missing person. Rhonda's father, Manuel Bornstein, and her brother, Jordan Bornstein, conducted intensive investigation and searches following the disappearance of Rhonda, and a group of persons who described themselves as "concerned" persons assisted Manuel Bornstein and his son in attempting to solve the mysterious disappearance of Rhonda Bornstein. For purposes of identification they are: Gary Fisher, James Ferreri, Frank Fontacchio, Jay Campbell and Jay Heard. The investigation on behalf of the Boston Police Department was delegated to Detective Stanley Gawlinski who first became associated with the investigation of the case on December 1, 1970 and continued in active charge of the investigation of the case and the bringing of these indictments up to the present time.

There is no doubt but what the defendant, George W. Mahnke, had dated Rhonda Bornstein and at the time of the events of September 15, 1970 was, for all intents and purposes, her steady boyfriend. Rhonda's father, Manuel Bornstein, became obsessed with the conviction that the defendant Mahnke was the key to the disappearance of his daughter and could shed light on the circumstances preceding and resulting in her disappearance. It is clear and from all the rational inferences in the evidence that he became very dissatisfied with the fruitless efforts of the police to solve Rhonda's disappearance and decided and entered upon a course of conduct in his capacity of a private citizen to compel the defendant, George W. Mahnke, to answer questions which he thought Mahnke alone could answer. Pursuant thereto, he had the volunteered assistance of the "concerned group" and entered upon a consistent and persistent and harassing course of conduct towards the defendant almost from the date of his daughter's disappearance up to and including the events of December 8, 1971 as hereinafter set forth. This evidenced itself almost immediately by some of the "concerned group" forcibly restraining Mahnke at Northeastern University, where he was a student, in broad daylight and seeking to isolate him and interrogate him. This involved no violence. It was simply a detention. Mahnke ran away before he could be detained and questioned. There was another occasion when the "concerned group" or some of them again visited Northeastern University and again attempted to isolate and detain him. Mahnke was deeply conscious of the fact that he was being followed by this group, and on this occasion he broke away and ran to a police patrol cruiser which was in the neighborhood. That was the end of that.

In this area of time Manuel Bornstein got together a group of approximately one hundred citizens, including the "concerned group," whom he had assemble in the Sears & Roebuck parking lot in the Fenway, and under his direction an intensive search of the entire Fenway area was made in an effort to locate his daughter's body if in fact she was not then living. This latter incident, and only the latter incident, I find to be an honest effort by a concerned and distraught parent to try to find some evidence to find a missing daughter in the area he believed to be the last-known place where she was alive. At very frequent instances during this fifteen-month period one or more of the "concerned group" would park a car in the area of Mahnke's house and proceed to follow him. On many of these instances I find that Mahnke knew he was in fact being followed. In August of 1971 Mahnke was employed at Henry F. Bryant & Son, Inc., civil engineers and land surveyors, 46 White Place, Brookline. Early in the morning of

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August 17, 1971, Ferreri and Fontacchio of the "concerned group" entered Bryant's and asked the young lady who was the receptionist if they could see Mahnke. Mahnke came from the interior of the premises, and when he saw Ferreri and Fontacchio he immediately became frightened and turned and ran and Ferreri and Fontacchio made an effort to follow him. They were stopped by the receptionist who indicated that she was going to call the police, and they thereupon left Bryant's, Mahnke's place of employment.

During the course of the investigation, William Bulger, Esq., an attorney, was retained by the defendant, George W. Mahnke, as his attorney. Detective Gawlinski was anxious to have an interview with Mahnke and to ask him certain questions concerning Rhonda Bornstein. He arranged such an interview with Attorney Bulger's permission to take place in Mr. Bulger's presence on December 22, 1970 at Bulger's office. The Bornsteins learned from some source, which is not clear from the evidence, that this interview was to take place. Campbell and Fontacchio conducted a surveillance of Attorney Bulger's office for at least the purpose of following him when he (Mahnke) left the office, and in view of their prior conduct it is a fair inference that they intended to again try to stop him and question him. While the interview was still in progress, Fontacchio and Campbell went up into Bulger's office and inquired as to whether or not Mahnke was there. They were advised by the secretary that they had left, so Fontacchio and Campbell left the office and assumed their position of surveillance outside Attorney Bulger's office. When Mahnke left his attorney's office after the interview, they observed him and followed him, but in the heavy Christmas pedestrian and motor vehicle traffic existing in that area of Boston they lost him. Either Campbell or Fontacchio had a car which belonged to a mutual friend which, from appearances, appeared to be equipped with a two-way walkie-talkie. Bulger observed the walkie-talkie apparatus when he left the building.

On the evening of December 8, 1971 at approximately 7:30 o'clock, George W. Mahnke drove onto the campus at Mt. Ida Junior College in Newton for the purpose of meeting one Karen DeAngelis, a student at Mt. Ida with whom he had a date. Mahnke parked his car in the vicinity of Miss DeAngelis's dormitory and then entered the dormitory to have her paged. While he was waiting for her he returned to his automobile, apparently for the purpose of getting some books. Prior to the happening of this event Manuel Bornstein, in his habitual surveillance of Mahnke, had picked him up leaving his home that evening and with Fisher in his automobile he followed him to Mt. Ida. In another automobile, Ferreri and Fontacchio also followed Mahnke in Ferreri's GTO automobile. Manuel Bornstein and Fisher were in Bornstein's car which was an Oldsmobile. After arriving at Mt. Ida, Fisher, Ferreri and Fontacchio concealed themselves in heavy foliage and bushes bordering the driveway in the area where Mahnke had parked his car.

When Mahnke approached his car after leaving the dormitory and for the purpose of getting some books, Ferreri, who is a big, strong, husky youth, grabbed him from behind and spun him around and said, "George, I would like to ask you a few questions." Mahnke struggled in an effort to escape and Ferreri hit him a vicious and punishing blow in the area of his left eye. It subsequently became inflamed, swollen, black and blue, and caused great discomfort. Mahnke's eyesight is such that he wears very strong prescription glasses at all times and has poor vision without glasses. When he was struck, he fell to the ground and lost his glasses. In all the events which are hereafter set forth, Mahnke was without glasses, never having retained possession of them at any time prior to at least December 10, 1971.

Mahnke started to scream to attract attention, and Manuel Bornstein, who was still in his car and parked a little way up the driveway, revved up the engine of Ferreri's GTO for the purpose of distracting the attention of a special police officer whom he knew to be in the vicinity. The attempt was successful because the security officer in the area, instead of paying any attention to Mahnke, went over to Bornstein to find out what the trouble was. While that was taking place, Fontacchio, who is again a big, strong, rough, husky adult, darted out from the bushes where he was concealed in the immediate area. He grabbed Mahnke by the left arm and Ferreri took him by the right arm and they walked him over to the Oldsmobile (Manuel Bornstein's car) which was being driven by Gary Fisher. Upon reaching the Oldsmobile, Ferreri entered the car first by the rear door on the driver's side. Mahnke was then pushed head first into the automobile by Fontacchio who was behind Mahnke. Mahnke was continuing to yell and scream all the time. When the parties were seated in the car, Ferreri had a so-called headlock on Mahnke and tilted his head onto his lap. Fontacchio still had him by the left arm. He was so placed in the automobile that his head was below the back of the front seat and he could not see Fisher and Fisher, the driver, could not see him.

Fisher then started the engine of the Oldsmobile and they proceeded to leave the Mt. Ida campus. At this time, Mahnke made his one and only attempt to escape during the entire course of events which occurred on December 8 and December 9. He wrenched himself loose from the grasp of both Ferreri and Fontacchio and he attempted to grab Fisher, the driver, around the neck from behind. He was, however, quickly and forcibly subdued and made no further attempt at freedom. Manuel Bornstein, who was then in Ferreri's GTO, followed them for some distance but lost them almost as soon as they left the Mt. Ida campus. I am satisfied that Manuel Bornstein did not then know that they intended to take Mahnke to Worthington, Massachusetts, or to keep him and isolate him for any extended period of time. I am not at all certain that when these events took place either Fisher, Fontacchio, or Ferreri had any predetermined plans to remove him to Worthington, Massachusetts, and isolate him. I am satisfied on the evidence that Fisher was the father of the thought and it occurred almost immediately after the kidnapping and shortly after they left the Mt. Ida campus. The decision to take him to Worthington, Massachusetts was a spontaneous and unpremeditated course of conduct. This finding seems imperative because neither Ferreri nor Fontacchio knew where they were going or where Worthington was, and the cabin in which Mahnke was kept and isolated in Worthington, Massachusetts, belonged to Fisher's uncle. It was locked and Fisher had no keys. They had to force an entrance and the area was knee-deep in snow. These factors negative, in my judgment, any existence of an orderly, prearranged plan of operation.

In any event, Ferreri and Fontacchio and Fisher did take Mahnke to an isolated hunting cabin in Worthington, Massachusetts. Worthington is located one hundred twenty-eight miles from the Mt. Ida campus in Newton. It was reached this evening by the Massachusetts Turnpike and proceeding from the third exit on the Turnpike through fairly narrow country roads for approximately twenty-five or thirty miles.

On all of the evidence from all of the witnesses, I find that Mahnke remained in virtually the same position in the car, namely in the back seat with his head in Ferreri's lap and both Ferreri and Fontacchio making certain that he did not move or otherwise attempt to determine where and in what direction the automobile was being operated. I further find that the combination of shock, fear, and injury from which Mahnke was then suffering rendered him in a physical state where resistance was not possible to him and any attempt at escape would have been completely fruitless. This trip consumed approximately two and one half hours and necessitated two stops at toll booths on the Massachusetts Turnpike. Mahnke was bleeding fairly heavily from the face and made no effort nor was he able to make any effort to alert authorities at the toll booths of his then plight.

After leaving Mt. Ida, Fisher made the decision to take the defendant to his uncle's hunting lodge in Worthington, Massachusetts. His uncle's name is Gurney Skelton and the hunting lodge was referred to as the Skelton Cottage. He had no key or other means of access to the cottage. He had no previous authorization from his uncle to use the cottage nor was his uncle aware of his using it. Fontacchio and Ferreri acquiesced in Fisher's suggestion that they go to his uncle's cottage knowing nothing about it, including its location. In order to evaluate the surroundings under which the defendant is alleged to have made certain statements, a brief description of the cottage and its surroundings follows. It is located in the town of Worthington in western Massachusetts, which is a small and isolated community. It is a favorite hunting area particularly during the winter season. It is a small cottage sparsely furnished with no central heat. There is a garage underneath the principal living area of the cottage and the cottage itself consists of five rooms and a bath. As one enters the front door he is in the kitchen, with a small toilet leading off one end of the kitchen. Directly behind the kitchen is a den or dining room and behind that is a sitting room or living room area. That is the room in which Mahnke was detained and was referred to during the hearings as the "detention room." Adjoining the living room is a bedroom and adjoining the dining room is a bedroom. All of the rooms are approximately ten feet by twelve feet. The detention room and the other rooms in the house all have windows which are securely locked, old-fashioned, and difficult to open. One would have to work at it to open a window. The cottage is located on a hill and the drop from the window to the ground is a severe drop of twelve to fifteen feet. The cottage is located at the foot of Dingle Road, which leads off the main road through Worthington. It is approximately nine-tenths of a mile from the main road. It is completely surrounded by dense woods and the nearest house (which is inhabited) is between one-quarter and one-half mile away on Dingle Road. There was in excess of two feet of snow upon the ground; it was bitter cold. Entrance to the cottage was gained by breaking the glass on the back door and reaching in and unlocking the door. There was located in the area another fairly substantial residence—part of the Skelton property—with the cottage just described virtually adjacent to it. The latter residence has no significance on any of the issues presented at the hearing. There is a fairly long driveway leading into the principal residence which had been plowed for about twenty feet. In front of both the cottage and the principal residence was an area of at least an acre of cleared land and probably described as the front yard of the Skelton property. I find as a fact, in view of the evidence and irrespective of the physical condition of Mahnke (which improved remarkably and fairly speedily), it was impossible for Mahnke to effectuate an escape. Even if left unguarded he would have found himself, upon leaving the cottage, in the middle of the wilderness in midwinter.

There has been some testimony that Ferreri or Fontacchio, at the time of the assault upon the defendant and on the trip to the cottage at Worthington and while at Worthington, had a gun in his possession. I find as a fact that none of the "concerned group" had a gun at any time, nor were they at any time in the possession of a weapon other than as hereinafter set forth.

This group of four—Ferreri, Fontacchio, Fisher, and the defendant Mahnke—reached the Skelton cottage in Worthington at 10:30 p.m. on December 8. The group got out of the car, which was parked in the plowed area of the driveway, and circled around the main farmhouse or residence to the small cottage located to the right and slightly to the rear. Fisher had a flashlight and led the way. Mahnke was kept under control and in custody by both Ferreri and Fontacchio who had him by the arms. Upon entering the cabin, candles were procured and lighted and Mahnke was placed in the detention room, the last room farthest removed from the front door. The cottage was extremely cold and Fisher left to turn on a gas heater located opposite the garage on the ground floor. Ferreri and Fontacchio procured ice packs and wet snow and gave it to Mahnke to apply to the injured area of his face.

Other than detaining Mahnke, I am unable to find from the evidence that he was interrogated in any area that evening by anybody. There was a couch located underneath the window hereinbefore described and Mahnke intermittently sat on it and laid down on it with the ice packs on his face. Fisher went into the kitchen and obtained a bread knife approximately twelve inches long which he exhibited to Mahnke and made sure that Mahnke knew he had it. He then took up his position in a chair across from Mahnke and, so far as I can determine, stayed there all night. At approximately 11:30 p.m. on December 8 Ferreri and Fontacchio left the cabin and returned to Boston, arriving in Boston about 2:30 a.m. on December 9. That left only Fisher and Mahnke in the cabin in the positions just described. I find that both men intermittently dozed off during the night. I am unable to determine whether or not at any time during that night the defendant was unguarded, with Fisher asleep or inattentive to the point where he could have attempted an escape. It does not become too material because I feel that under the circumstances then existing an escape would have been impossible and, if possible, foolhardy. There is no evidence of any specific threat of Mahnke by Fisher with the knife, but I am satisfied and find that Mahnke was an extremely scared and terrified young man and didn't need any threats to keep him subdued. Both of the young men were wakened by the return to the cottage of Ferreri at approximately 6 a.m. on the morning of December 9.

Ferreri, upon leaving the cottage at 11:30 the night before, had arrived in Boston at 2:30 a.m. He dropped off Fontacchio at his home and immediately headed back to Worthington. Before heading back he went through the Newton Highlands, and in the principal square he picked up John (Jay) Campbell who accompanied him on the trip back to Worthington. Campbell was one of the "concerned group" who had been harassing Mahnke, and it was he and Fontacchio who attempted to follow Mahnke when he had the conference at Attorney Bulger's office. It is an inescapable conclusion that Campbell met Ferreri by arrangement to add numbers to the group to submit Mahnke to a grilling. It was for that purpose and for that purpose alone that he was on the streets at Newton Highlands at 2:30 in the morning. It was for that purpose and that purpose alone that he accompanied Ferreri back to Worthington.

When Ferreri and Campbell arrived in Ferreri's GTO, Mahnke was still on the couch in the detention room. They joined Fisher at approximately 6 a.m., and from 6 a.m. until 10 a.m. the three of them relentlessly interrogated Mahnke concerning his knowledge of the whereabouts of Rhonda Bornstein. I am satisfied and find that no physical force was used on Mahnke. I find that from 6 a.m. to 10 a.m. Mahnke divulged no information concerning Rhonda Bornstein and continually denied he knew anything about Rhonda. I am satisifed and find that the interrogation was interspersed with threats to Mahnke's life and the language used was extremely rough. If it was intended to intimidate Mahnke, it had the desired effect. I find that Mahnke was terrified, scared to death, uncertain as to whether or not they intended to kill him, and, coupled with his physical injuries and a splitting headache, nothing that he said or did could under any circumstances be considered by anybody to be voluntary.

The interrogation was interrupted by the arrival at the cottage at approximately 10 a.m. of Fontacchio and another member of the "concerned group"—one John (Jay) Heard. When Ferreri left Fontacchio off at his home at 2:30 on the morning of December 9, Fontacchio went to bed for a few hours, completely without the knowledge of his family that he had even been home, and went out early the following morning and eventually met up with Heard. I find that this was by prearrangement. Heard was part of the original leaders of the "concerned group"—a very able and apparently educated young man—and they desired his presence in an effort to assist in the interrogation of Mahnke. He was advised that they had Mahnke in the cottage at Worthington, and he voluntarily went with Fontacchio to Worthington for the sole purpose of adding force, numbers, and ability to the interrogation of Mahnke. The trip to Worthington was made in a Ford Maverick automobile which Heard had rented from an agency in Needham. On the way to Worthington they stopped and bought some food which they distributed to the group, including Mahnke. Mahnke had by way of food hamburgers, french fries, and cokes.

After the makeshift meal was concluded, the entire group of five all assembled in the room of detention, with Mahnke still on the couch. From approximately 10 a.m. until 12 noon Mahnke was again subjected to a harassing, threatening, profane, and insistent interrogation. The threats were threats not only of physical injury to him but threats to take his life—"that he would never leave there alive." During the entire period of time, Mahnke was completely terrified, in fear, and thoroughly subdued. However, at no time during this period was there any actual physical violence visited upon Mahnke.

At approximately noon on December 9, the interrogation was interrupted by the presence of somebody at the door of the cottage. Gary Fisher left the detention room and closed the door behind him. He went to the outside door alone and met a man dressed as a hunter carrying a shotgun. This man was later identified as Chief David Tyler of the Worthington police force who was in the area for the purpose of doing some hunting. He saw the cottage occupied and was curious enough to make some inquiry as to who was there and for what purpose. Fisher identified himself as the nephew of the owner, Gurney Skelton, and advised him that he and a group of friends had come up for the purpose of spending a few days at the cottage. The conversation and Fisher's knowledge of the owner and the owner's family was sufficient so that Chief

Tyler was satisfied and he left the cottage and proceeded to do some hunting from then until late afternoon. Fisher returned to the detention room and reported back to the group and told them they had been interrupted by a hunter and they had better finish their business and finish it fairly fast. Chief Tyler had not identified himself to Fisher as the Chief of Police, and I find that Fisher did not know he was the Chief of Police. Mahnke was then subjected to the same type of grilling, threatening, harassing, insistent interrogation that had existed prior thereto until about 12:30 p.m.

At approximately 12:30 p.m., Mahnke stated to the group that he would talk to Ferreri alone—everybody else had to get out of the room. Ferreri declined to talk to him without the presence of a witness and insisted upon Jay Campbell staying in the room. Mahnke finally acquiesced and the others left the room. It is difficult to understand from the evidence why a rapport or relationship of some degree of confidence and friendliness arose between Ferreri and Mahnke at this point. It may be that Mahnke picked up the least of all evils to be his confidant, but in any event I find the relationship between Ferreri and Mahnke at this point warmed considerably.

With only Ferreri and Campbell now present in the detention room, Mahnke continued for a short period of time to refuse to divulge any information about Rhonda Bornstein. After a short interval, however, and after Ferreri had reassured him that he would not be harmed in any way, Mahnke made a statement which is the subject matter of this motion to suppress.

In substance, Mahnke said, in answer to questions, that he had met Miss Bornstein at about 11:30 p.m. near the bus stop at Sears & Roebuck. They had an argument and Miss Bornstein slapped Mahnke. Mahnke quickly retaliated by hitting her back, causing her to fall, and she hit her head on the curb. The defendant tried in vain to revive her by mouth-to-mouth resuscitation and could not. He believed that she was dead, and he carried her down the hill to an abandoned railroad track and buried her. He wrapped her in a blanket which he found nearby, dug a shallow hole with his shoes, and placed her body in it. Mahnke claimed that the whole thing was an accident, and at this point (sometime between 1 p.m. and 2 p.m.) Mahnke said that the body was near Sears & Roebuck but declined to locate it with any greater particularity.

During the hearing, Mahnke denied ever having made the statements. Since the Commonwealth claims he did make the statements, which would be testified to by private witnesses, I find that Mahnke's denial is completely immaterial and he has standing to request the suppression. In addition, since I believe that Mahnke did in fact make these statements, then, notwithstanding his denial of ever having made these statements, I rule that he has the requisite standing to suppress them. The defendant does admit, however, that he said at this time, "I will take you to where Rhonda is" and that the body was in Boston. At the time of making these statements, he claims he had no idea of the location of Rhonda Bornstein's body. The group did not leave the cabin until 4 p.m. The alleged statements by Mahnke were made in the general vicinity of 2 p.m. I am unable to find from the evidence what kept them engrossed in the cabin from 2 p.m. until 4 p.m. From some evidence before me, it would appear that there was considerable conversation concerning a more definite description of the location of where Rhonda Bornstein's body was buried, and also considerable discussion about whether they would bring Mahnke back to Boston with them while they returned to locate the body in the area of Sears & Roebuck or whether part of the group would go to Boston and try to find the body and leave Mahnke still in the custody of some of the group and kept at Worthington.

At the time that Mahnke indicated he wanted to talk to Ferreri alone, the rest of the group decided to get some food for lunch. They went to a nearby roadside stand and did buy a considerable quantity of food. The food was brought back to the cabin but was never in fact consumed. I find as a fact that at that time (and this was after he had made the alleged statements to Ferreri) Mahnke inquired as to the cost of the food and made a voluntary and unsolicited effort to pay for his share of the groceries. Mahnke was in possession of his wallet and had money on his person.

After Mahnke made the alleged statements to Ferreri and Campbell, all hostility on the part of the "Worthington Five" stopped. There was no longer any intimidation, threats, or force. Mahnke's conduct towards the group became voluntary and cooperative. After making the foregoing statements, Mahnke said to Ferreri, "You are the first person I have ever told in fifteen months, and I feel like a different person getting it off my chest. I consider you are the first friends I have had in fifteen months." This completely changed atmosphere continued in the cabin until they left at 4 p.m.

Based upon the foregoing subsidiary facts, I find the ultimate fact that all statements made by Mahnke at the cabin in Worthington to any of the "concerned group" (Ferreri, Fontacchio, Fisher, Campbell, and Heard) were involuntary and induced by threats, duress, intimidation, fear, and at least some violence (the original striking of the defendant at Mt. Ida). These statements I rule as a matter of law are suppressed and will not be admitted at the trial.

When Fontacchio, Fisher, and Heard returned to the cabin with the meat and groceries and provisions for lunch, Ferreri informed them the information which Mahnke had told them. It was at this point that the "concerned group" had a disagreement among themselves on the two basic issues of getting more particular information from Mahnke as to precisely where the body had been buried, and whether or not Mahnke should go with them or be left in custody of some of the group at the cottage. Indicative of some hint of friendship and reliance which Mahnke had placed upon Ferreri in making the original statements and thereafter, Ferreri assumed the leadership of the group and persuaded them that

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Mahnke could be trusted and should no longer be left in custody at the cabin. Thereupon, at some time between 4 p.m. and 4:15 p.m. on December 9, the group left the cabin at Worthington and headed back around the main farmhouse to the driveway where the two cars were parked. There was considerable evidence at this point that the group consisted of seven. Some of the witnesses, particularly Mahnke, included in the group Michael Bonner (the owner of the car that had been used by Campbell and Fontacchio at the surveillance at Attorney Bulger's office). I find that he definitely was not there. The group at no time consisted of more than the defendant and five of the "concerned group."

Upon leaving the cabin, the entire group proceeded through the snow to the automobiles, in single file with Ferreri and Mahnke leading the procession. As they approached the two cars, two men were standing there, one identified as the Chief of Police, David Tyler, (the hunter who had appeared unannounced at the cabin about 12 noon), and the other Reino Liimatainen. The latter had been hunting on his own and had met Chief Tyler and they had thereafter hunted together. They had concluded hunting for the day. Liimatainen had apparently arrived at the scene in a pickup truck, which was parked in the general area. There was likewise present upon the scene a camper which had parked in the area and which contained some people who remained unidentified during the hearings and contributed nothing to the resolution of the issues before the court. They apparently never participated. Upon seeing the cars still at the cabin, I find that Chief Tyler, and particularly Reino Liimatainen, became very suspicious of their presence and their conduct and thought that it required investigation. Prior to approaching the cottage and making further investigation, the group left and proceeded towards them as indicated. There were two cars belonging to the group there at that time—the Pontiac GTO which had been driven up by Ferreri and the rented Ford Maverick driven by Heard and Fontacchio. Upon approaching the automobile, Ferreri and Mahnke went in front of the Pontiac GTO while the rest of the group headed towards the rear of the GTO where Tyler was standing. Tyler's hunting companion, Liimatainen, was standing about ten feet behind the rear of the Maverick with a loaded shotgun in his hands. Because of what transpired at that time and what was said, I think it important to attach a sketch. The attached sketch shows the relative location of the cabin and the principal farmhouse, the relative positions of the two cars owned or under the control of the "concerned group," and the approximate positions of each of the "concerned group" with relation to the cars and to each other at the time the following incident took place. Tyler spoke to Fisher and he asked him to identify himself and had a general conversation with him concerning the reasons for the group being at the cottage. While this conversation was going on (it lasted for about three minutes) Liimatainen said in a voice which I find was not only loud enough for all six members of the group to hear, but was belligerent and menacing. "If there is any funny business I will blow your guts out." He had in his hands a shotgun which was loaded, and he took the affirmative action of slipping the shells into the chamber ready for discharge. It was held in a position by his side at hip level. I find as a fact that Chief Tyler, with the presence and foregoing actions of Liimatainen, had the entire group in their respective positions all under their direction and immediate control to the point that they could have arrested or taken into custody any one of them. I find at this point that the defendant Mahnke was then in a position, if he so desired, to effect his release. Furthermore, I find that there was no physical force being applied to him by any of his five captors. There were no guns, knives, or other weapons being held at his back. All he had to do was open his mouth and either ask for assistance or narrate to the police chief and Liimatainen the circumstances under which he had been kidnapped and held in custody against his consent all night and all day. He did nothing. He said nothing. I find this to be

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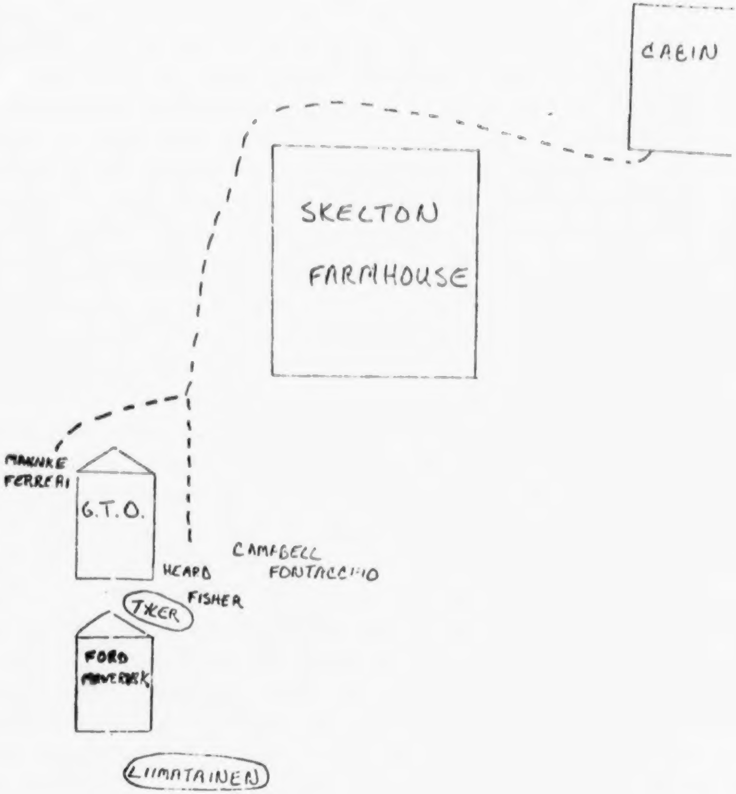
CABIN
SKELTON FARMHOUSE
MANNKE
FERRERI
G.T.O.
HEARD
CAMPBELL
FONTACCHIO
FISHER
TYLER
FORD MAVERICK
LIIMATAINEN

extremely significant evidence to be weighed by me in considering whether or not his conduct and statements which thereafter took place were voluntary or whether the exercise of duress had ceased to control his mind and his actions. His failure to take any action to effect his release or to ask for outside assistance which was then present and available to him I find to be thoroughly consistent with a complete change of attitude on his part after he made the statements in the cabin and "got the whole matter off his chest." The spirit of cooperation and at least tolerance of his situation, his at least friendship for some of the principals which existed in the cabin prior to their departure, is best evidenced by what took place at this time. Fisher, in his conversation with Chief Tyler, apparently satisfied him that their presence there was lawful and that nothing had transpired which would warrant their detention. Thereupon, they proceeded to leave the cabin and Worthington and to proceed to Boston.

When the "concerned group" broke up they got into the two automobiles. Ferreri and Campbell got into the front seat of the GTO with Ferreri driving. Mahnke and Fontacchio got into the back seat of the GTO with Mahnke sitting behind Ferreri. Heard and Fisher got into the Ford Maverick with Heard as the driver. There is testimony that Ferreri held a gun on Mahnke while the hunters were present (that testimony comes from Mahnke). I do not believe it. I find as a fact that none of the "concerned group" had a gun. When the group had assembled in the GTO, Mahnke then made a statement which I find to be very significant and persuasive in arriving at an ultimate finding on the issues here presented. He said to Ferreri, "See, I could have gotten away if I wanted to, but I didn't." I find this statement was volunteered. It was made voluntarily without any threat or coercion or the exercise of any duress. It certainly indicated to me, and I so find, that at that time he was completely free from fear.

After leaving the Skelton cottage, the cars reached the Westfield toll booth on the Massachusetts Turnpike preparatory to heading east towards Boston. It was necessary at that time for the car in which Mahnke was seated to stop at the toll booth and pick up a ticket. Mahnke had recovered from the initial pain and discomfort of the blow in the eye and, while he was not in the best of physical condition, he could have made some effort by hollering or shouting or otherwise to attract the attention of the attendants who were manning the toll booths at Westfield. He did not. The car proceeded on the Massachusetts Turnpike until it reached the toll booths at Weston just outside of Boston and Route 128. From the time they left the cabin, I find that Mahnke was not physically restrained nor was he again physically threatened. At the Weston toll booth Ferreri did not have enough money to pay the toll. Thereupon, Mahnke took some change from his pocket and contributed a small sum (ten or twenty cents) to the total amount of the money which Ferreri needed to pay the toll and with which he did pay the toll. In ruling upon the ultimate issue here involved, I have considered this to be completely voluntary action on the part of Mahnke.

After passing through the Weston toll booth, the two cars continued on the Massachusetts Turnpike and exited at the Cambridge-Allston exit near the Coca-Cola bottling plant at Storrow Drive. I find at this point that Mahnke voluntarily and free from fear or duress gave directions to Ferreri on where to go and what route to follow. He directed Ferreri to the Sears & Roebuck parking lot. In order to reach the Sears & Roebuck parking lot, the GTO with Mahnke in it was proceeding down Park Drive. While crossing the bridge over the MBTA tracks, Mahnke pointed to an island in the middle of the road on the driver's left which served as a bus stop or taxi stand, and entirely unsolicited and without fear and under no duress Mahnke tapped Ferreri on the shoulder and said, pointing to the island, "That's where it happened."

After the two cars pulled into the Sears & Roebuck parking lot at about 6 p.m. or 6:30 p.m., everyone got out of their cars with the exception of Ferreri and Mahnke. They remained briefly in the GTO. There obviously was some conversation about where the body was, but Mahnke refused to speak to Ferreri because he said he felt the car was "bugged." Thereupon, they got out of the car. When outside the car, Ferreri asked Mahnke where was he supposed to go to find the body. At this point, the Sears & Roebuck parking lot on Park Drive in the Fenway near the corner of Boylston Street abuts the MBTA tracks. It is a regularly scheduled stop for the MBTA at that point. In order to reach the MBTA station, pedestrians would cross through the parking lot, step across an abandoned set of railroad tracks, and enter the loading platform of the MBTA station. The abandoned railroad tracks run parallel to the MBTA tracks and the area is desolate, deserted, and immediately adjacent to a long auxiliary building of the MBTA running for a considerable distance. It appears to be an MDC maintenance shed constructed of concrete blocks. Between the edge of that building and the abandoned railroad tracks is an area of approximately ten feet in depth, overgrown with trees and shrubs, and containing discarded debris and rubbish. The maintenance shed, so-called, has at frequent intervals groups of three windows. In response to Ferreri's question to Mahnke as to where he was supposed to go to find the body, Mahnke pointed under the bridge (bridging Park Drive as it passes over the tracks) and said, "It (the body) will be right down at the bottom of the three windows. If you have any trouble there will be a two-by-four to mark it off." Ferreri proceeded down the abandoned railroad tracks as dictated by Mahnke. Mahnke remained standing in the Sears & Roebuck parking lot with the other four members of the "concerned group." In a very short period of time, Ferreri returned and stated to Mahnke and to the group that he was confused, there were several areas which had more than three windows and he, Mahnke, would have to help him. When Ferreri said to Mahnke, "I can't find it, you will have to come down with me," Mahnke responded by saying, "I am not going there. . . . it is spooked, and anyway you are going to kill me down there." When Mahnke refused to go down the tracks with Ferreri, Heard took a pocketknife from his coat pocket and handed it with the blade closed to Mahnke. This knife with the blade extended was approximately six to eight inches in length. Either Ferreri or Heard then said to Mahnke, "If you think he is going to kill you, take the knife." Mahnke opened the knife and raised it in the direction of Ferreri and then both young men, Ferreri and Mahnke, proceeded in the direction of the tracks from which Ferreri had just returned. They walked across the parking lot, turned left, and proceeded down the abandoned spur track. Ferreri led the way with Mahnke about three feet behind and on his right side. Mahnke was carrying the knife in his right hand in a raised and extended manner at the level of his waist.

Mahnke and Ferreri had gone about thirty or forty yards down the track when Mahnke stopped and stated, "This is it. I am not going any further." He then pointed to an area on the ground below three windows on the MDC building and said, "It's right down there. If you have trouble finding it, it is marked by a two-by-four." Mahnke was then about four or five feet behind Ferreri, and the area to which Mahnke pointed was another four feet in front of Ferreri. This was an area approximately twenty to twenty-five feet beyond the spot where Ferreri had originally searched for the three windows unsuccessfully and had become confused.

After Mahnke and Ferreri had left to go down the railroad tracks to find the body, Frank Fontacchio and Jay Campbell left the Sears & Roebuck parking lot and started to head down the tracks in the direction in which Mahnke and Ferreri had gone. At this point, Mahnke was being physically restrained by nobody. Ferreri was four or five feet in front of him and about to go into the underbrush adjoining the building and search for the body under the three windows. He was completely occupied. Mahnke then turned and started to go back toward the Sears & Roebuck parking lot, and at this time Frank Fontacchio and Jay Campbell were walking towards him. He was between Ferreri on one side and Fontacchio and Campbell on the other. Mahnke passed Campbell and Fontacchio not far from the entrance to the MBTA station. They didn't stop him. They didn't speak to him. They did not attempt to restrain Mahnke, who could have turned to his left and gone to the MBTA loading platform and mixed with the crowd and group which was then there, this being approximately 6 p.m. or 6:30 p.m. He could have completely disappeared on his own and completely escaped from the control of any of the "concerned group." He did neither. He passed Campbell and Fontacchio and voluntarily continued back into the Sears & Roebuck parking lot and stopped and again put himself in the company of Heard and Fisher, who were still standing near the parked cars. Campbell and Fontacchio, who were following Mahnke and Ferreri down the tracks, eventually met up with Ferreri, and Ferreri said that Mahnke had just shown him where the body was buried. All three then proceeded to the area where the body was supposed to be.

December 9, 1971 was a Thursday night. The Sears & Roebuck store was open. The parking area was moderately filled with parked cars. Pedestrian traffic was moderately heavy with people going to and from the MBTA station and with customers of Sears Roebuck going to and from their automobiles and the store. Many of them passed by Mahnke and the "concerned group" in close proximity to them both before Mahnke indicated where the body was buried and while the events leading to the discovery of the body were taking place. I find as a fact that if Mahnke had desired, he could easily and readily have escaped from the control of the "concerned group" at any time by either running away or by hollering and shouting and making an outcry and calling attention to the fact that he was being forcibly and illegally detained. He did nothing to effectuate his freedom or to call attention to the fact that he had already been a victim of a kidnapping or was then being held against his will.

When Ferreri returned after his first unsuccessful search and said that Mahnke would have to help him, Mahnke said, "I am not going down there, it is spooked, and anyway you are going to kill me down there." I find specifically that Mahnke was not then in fear of his life. On all the evidence, I have no doubt that he did make the statement, "I am not going down there . . . You are going to kill me." I find this statement was made by Mahnke as an excuse because he did not want to go down there. He had an overpowering fear of returning to the area where the body was buried and seeing it uncovered. The only weapon in existence at that time was a knife which was then in the possession of Mahnke, having been given to him by Heard. Mahnke was totally in control of the situation and had Ferreri march ahead of him while he, Mahnke, held the knife menacingly at his back. With the voluntary and cooperative conduct that Mahnke exhibited from the early afternoon of December 9 at the cabin up to and including the time that he made the statement that he was afraid he would be killed, leads me to the conclusion that the statement was made as an excuse and he entertained no such fear. I make this finding upon the evidence that the nearest that Mahnke would go to the spot where the body was buried was ten or fifteen feet and then stood there pointing. If he was in fear of being killed (assuming the body was discovered), there is no rational explanation of his conduct in voluntarily surrendering himself to the custody and control of those who were threatening him.

When Ferreri was down in the abandoned tracks for the first time, looking for the three windows which Mahnke had indicated, Mahnke was standing next to Heard in the parking lot at Sears & Roebuck. Fisher, Fontacchio, and Campbell were standing in a detached group by themselves. Heard was a little older than the rest of the group (twenty-four—the others were in their very early twenties). He was well-educated, extremely literate and intelligent, and a small businessman. He was very articulate and the only intelligent, logical interrogation of Mahnke at the cabin was by Heard. He was persistent and relentless, but not abusive or threatening. When Mahnke found himself alone with Heard, Mahnke voluntarily, without solicitation, certainly without intimidation, fear, threats or duress, said to Heard that he, Mahnke, had killed Rhonda Bornstein. He further stated that he wasn't worried about the consequences because the "concerned group" were hostile citizens and their testimony would never hold up in court. Furthermore, he said he could retain F. Lee Bailey as a lawyer and Bailey would be sure to get him off. When Heard asked him how he expected to get away with it, Mahnke replied that it rained on September 15, 1970 and therefore he didn't have to worry about dogs discovering the body because dogs can't pick up a scent in rainy weather. This was a free and relaxed conversation.

Picking up on the railroad tracks when Mahnke left and rejoined the group at the parking lot, Ferreri, Fontacchio, and Campbell went to the area indicated by Mahnke. Campbell started scraping this area with a stick, or a dry branch, which he found nearby. After about five or six minutes of scraping, Campbell discovered the corner of a gray blanket and abruptly pulled at it. This caused a layer of earth around the blanket to move, and all members of the group were greeted with a very strong and unusual odor. Fontacchio lit some matches and the three young men discovered what they thought to be the bones of a human body. They left the area and rejoined the group in the Sears & Roebuck parking lot. Altogether the group, individually and collectively, spent approximately thirty minutes in the area of the tracks. When Ferreri, Fontacchio, and Campbell returned to the cars, Mahnke spoke to Ferreri and said, "I told you I didn't want them (Fontacchio and Campbell) to go down with you." Ferreri replied, "There was nothing I could do." Ferreri then asked Mahnke how he wanted to go home, and Mahnke said that he wanted Ferreri to drive him home. This was between 6:30 p.m. and 7 p.m. The two men got into the GTO and left the other four men in the parking lot. Mahnke was still holding the knife, and he sat in the front seat with his back against the passenger door. Ferreri did not know how to get to Mahnke's home and Mahnke gave him directions. When they were in Mahnke's neighborhood, Mahnke requested to be dropped off a short distance from his home. Ferreri complied with this request. Just prior to getting out of the car, Mahnke said to Ferreri, "Please don't turn the body in until after Christmas so my parents and all of us will have a good Christmas." As Mahnke got out, he surrendered the knife and threw it onto the floor of Ferreri's car and left. While I have found that Mahnke had several instances in which he could have escaped, either alone or with outside assistance which was presently available, namely outside the cabin with the Chief of Police and the hunter present, at the toll booths at both Westfield and Weston on the Massachusetts Turnpike, at the Sears & Roebuck parking lot, and when he was left alone on the railroad tracks, I further find that the first time he was free to leave the acquiescence of the group who had originally kidnapped him was between 6:30 p.m. and 7 p.m. on December 9 when Ferreri asked Mahnke how he wanted to get home just prior to driving him home.

All five members of the Worthington group met in Newton Centre and had a discussion amongst themselves as to what, if anything, they should then do. It was concluded that they should discuss the matter with their respective parents and seek their advice. With the exception of Heard, the other four members of the group did so. After a discussion with their respective parents, the group reassembled in the Newton Highlands parking lot and it was decided to notify the Bornsteins. The Bornsteins were notified and Manuel Bornstein, at about 11 p.m. or 11:30 p.m. telephoned Detective Gawlinski and related to him what the Worthington group had told him and told him where the body of Rhonda Bornstein could be found.

Based upon the subsidiary facts which I have found, commencing immediately subsequent to the statements made by Mahnke at the cabin to Campbell and Ferreri and terminating at the time Mahnke left Ferreri's automobile in the vicinity of his, Mahnke's, home, I make the following ultimate findings.

1. I find that a spirit of cooperation and reliance and trust existed between Mahnke and Ferreri.

2. I find that all of the conduct participated in by Mahnke from the time they left the cabin was free, voluntary, intelligent, and deliverate cooperative acts on his part, unaffected by fear, duress, intimidatión, threats, or physical violence.

3. I find that all statements which he made from the time he left the cabin were free, intelligent, and voluntarily made by him, unaffected by threats, fear, duress, or physical violence.

4. From the time that he made the statements in the cabin to Ferreri and Campbell, his will and his actions ceased to be overborne by anything said or done by the "concerned group" which had custody of him. I make this finding having in mind that he was transported to Boston in the automobile of his captors who decided to keep physical control of him until such time as he had showed them where the body of Rhonda Bornstein was buried. I find, however, that that was a control with which he thoroughly acquiesced and did not resist and affirmatively and deliberately and consciously cooperated and assisted. I therefore rule as a matter of law that everything said and done by Mahnke to any person or persons from 4:15 on the afternoon of December 9, 1971 to and including approximately 7 p.m., or in any event the time that he was left in the vicinity of his home, to be competent and admissible evidence. I rule that all statements attributed to the defendant Mahnke on the evening of December 8, 1971 up to and including 4:15 p.m. on December 9, 1971 to be inadmissible and I hereby order them suppressed.

FINDINGS AND RULINGS ON WHAT IF ANY DIRECTION, AUTHORITY OR CONTROL WERE EXERCISED BY THE POLICE OR PROSECUTING AUTHORITIES IN THE CONDUCT AND ACTIONS OF THE PRIVATE CITIZEN'S GROUP

As I have previously found, Detective Stanley Gawlinski was designated by the Boston Police Department and the District Attorney's office in Suffolk County to be in complete charge of the investigation of the disappearance of Rhonda Bornstein early in December of 1970. Prior thereto it had been under the general supervision of police authorities at Station 4 and Detective Sheehan principally, with others, worked on the case intermittently. Detective Gawlinski spent so much time with the Bornsteins in interviewing friends and associates of Rhonda Bornstein, and following all possible leads which could prove at all helpful in determining her whereabouts, that he came to be considered by the Bornsteins as a close family friend. When her disappearance was not solved, Manuel Bornstein became more and more irritated, and repeated time and time again that the defendant Mahnke had the answers and Gawlinski had to get the answers out of him, and that if the police did not, then Bornstein would, in effect, take matters into his own hands. Gawlinski vigorously and vehemently opposed any conduct on the part of Bornstein or his group which would harm or interfere with the liberty and free movements of Mahnke, and he specifically advised them that if they attempted to do anything in their eagerness and anxiety which was unlawful, they themselves would be defendants before the court. I find that Detective Gawlinski was aware that the suspicions of the Bornstein group had focused upon Mahnke and that they were harassing him by their tactics. After they had taken place, I find that he learned of the incidents which had taken place on two occasions at Northeastern University, as heretofore set forth in these findings. I find that after Bornstein's insistence that Mahnke be subjected to interrogation (which he arranged at Attorney Bulger's office), he did notify the Bornsteins that such interrogation was to take place. I am unable to find that he told them where it was to take place or when it was going to take place, and nowhere in the evidence can I find anything to support a finding that Gawlinski leaked that information, despite the fact that the Bornstein group became aware of it and did in fact on that occasion keep him under surveillance and follow him. I find that Gawlinski was aware of the meeting of the Bornstein group with many other interested citizens in the Sears & Roebuck parking lot in the spring of 1971 and did not discourage it and had no occasion to do so because what was contemplated certainly was not subject to criticism. At Mr. Bornstein's insistent suggestion, Detective Gawlinski arranged to have the Muddy River dragged in the vicinity of Sears & Roebuck. This was arranged by Gawlinski and did in fact take place with scuba divers in April of 1971. I find that Gawlinski became aware of the fact that Ferreri and Fontacchio had attempted to question Mahnke and did harass him at his place of business at Bryant's in Brookline in August of 1971. I find that immediately thereafter, and when he learned of it, Gawlinski again sternly reprimanded Bornstein and the "concerned group" who were working with him for that type of conduct, which he indicated again would not be tolerated and might result in themselves being in trouble. I find that this was the last time that Gawlinski had any direct contact with Bornstein or any of Bornstein's associates until after the discovery of the body in December of 1971. I find that such contact as Gawlinski did have was with the Bornstein family, probably Manuel Bornstein and his son Jordan. At no time, in the evidence, can I find that he ever directly talked to any of the five men involved in the kidnapping of Mahnke, although he was aware that a group or groups were working with Manuel Bornstein and his son Jordan and under their direction in an effort to solve the diappearance of Rhonda. I specifically find that Detective Gawlinski had absolutely no knowledge of any kind, nor any intimation of any kind, that the group planned to abduct Mahnke and submit him to interrogation. On the night of December 9 he was attending school at Northeastern University, where he was taking courses. He went to school that afternoon, attending classes until 6 p.m., suspended for dinner which he had at the school, and then stayed at the school during the evening until he came home at approximately 11:30 p.m. when he learned of what had taken place under circumstances hereinafter set forth. Based upon the foregoing subsidiary facts, I make the ultimate finding that neither the Boston Police Department, Detective Stanley Gawlinski, nor anyone concerned with the prosecution of the case in an official capacity had anything to do directly or indirectly by suggestion or direction with the acts committed by the "concerned group" on the evenings of December 8 and 9, 1971. I therefore rule as a matter of law that none of the acts complained of in the motion to suppress can be construed as the acts of prosecuting authorities, and since they were the acts of private citizens, constitutional immunities attaching to a defendant for acts committed by prosecuting authorities do not attach.

FINDINGS OF FACT AND RULINGS OF LAW ON THE MOTION TO SUPPRESS STATEMENTS MADE BY THE DEFENDANT MAHNKE TO POLICE AUTHORITIES ON SEPTEMBER 16 AND 17, 1970

Pursuant to an investigation into the whereabouts of a missing girl named Rhonda Bornstein, Detective Frank Sheehan of the Boston Police Department requested George Mahnke to come to the District Four station for some questioning. This request was made to Mrs. Shirley Mahnke, George's mother, at some time in the early evening of September 16, 1970 while Detective Sheehan was visiting at the Mahnke home at 20 Imrie Road in Brighton, Massachusetts. There is no indication that Detective Sheehan made anything more than a "request" for George to come to District Four—he was not "ordered" or "commanded" to come in for questioning. Furthermore, when Sheehan requested that Mahnke come to District Four, the police were *not* investigating the commission of any crime—they were simply investigating the disappearance of Miss Bornstein.

George Mahnke and his father, Wayne Mahnke, arrived at District Four at about 10:30 - 11:30 p.m. on September 16, 1970. Detective Sheehan immediately commenced the questioning of Mahnke in a separate room out of the presence of his father. While this questioning was being conducted by Detective Sheehan, other officers and detectives were also present in the interrogation room at different times, and these officers also occasionally asked some questions. This questioning, headed by Detective Sheehan and which was conducted in a friendly, nonhostile atmosphere, consumed about an hour and a half. At no time during this period did Detective Sheehan or anyone in his presence warn Mahnke of his constitutional rights to have counsel present or to remain silent. As stated earlier, Detective Sheehan did not suspect Mahnke of the commission of any crime, but he did suspect that Mahnke had knowledge of the whereabouts of Miss Bornstein which he was not disclosing.

At approximately 11 p.m. on September 16, 1970, Lieutenant Robert Bradley arrived at District Four to confer with Detective Sheehan on a matter unrelated to this case. At this point, when Lieutenant Bradley entered the station he had no knowledge about the Rhonda Bornstein disappearance. However, Detective Sheehan quickly informed Bradley about the situation and asked him if he would speak to Mahnke about Miss Bornstein's disappearance.

Lieutenant Bradley agreed to ask Mahnke a few questions, and this interrogation commenced at about 11 p.m. and lasted for approximately two to two and one-half hours until about 1 a.m. on the morning on September 17, 1970. While Lieutenant Bradley was conducting this interrogation, numerous other police officers and detectives were present in the interrogation room including Detective Sheehan, Detective Murphy, Sergeant Crocker, and Detective Driscoll. At no time during the interrogation did Lieutenant Bradley warn Mahnke about his constitutional rights to remain silent or to consult with an attorney. However, there is no indication that any statements given by Mahnke at this time were anything but voluntary, given with the full consent and cooperation of both Mahnke and his father. Furthermore, Lieutenant Bradley did not suspect that Mahnke had committed any crime, but, as with Detective Sheehan, he did suspect that Mahnke was lying, or at least not telling the whole truth, because he gave two or three inconsistent stories as to what happened on September 15, 1970 when he last saw Rhonda Bornstein.

The interrogation was conducted in a thoroughly precise manner, without any evidence of overreaching or coercion. Unless there be any misunderstanding, at no time that evening of the 16th and early morning of the 17th was Mahnke ever advised by anybody of his constitutional rights to retain counsel or remain silent. Detective Sheehan and Lieutenant Bradley reduced to a writing their version of this interview, and this was done sometime during the week of September 18, 1972, almost two years later.

Based upon the foregoing findings of fact, I rule as a matter of law that under the circumstances here existing no obligation rested upon the police conducting the interrogation to give Mahnke his *Miranda* warnings. I have clearly found that there was no form of "custodial interrogation" as is required by *Miranda* because Mahnke was clearly not in custody. I therefore deny the motion to suppress the statements made by the defendant Mahnke on September 16 and 17, 1970, and if they are otherwise relevant and material they may be admitted in evidence.

FINDINGS AND RULINGS ON MOTIONS TO SUPPRESS STATEMENTS MADE BY THE DEFENDANT, GEORGE MAHNKE, ON SEPTEMBER 24, 1970

On September 18, 1970 George Mahnke retained Mr. William Bulger, Esq. of 11 Beacon Street, Boston, as his attorney to represent him and counsel him on any further developments in the disappearance of Rhonda Bornstein, Thus the attorney-client relationship between Mr. Bulger and George Mahnke arose on this date—September 18, 1970.

At approximately 3:30 p.m. on September 24, 1970, George Mahnke, Attorney Bulger, and Mr. Wayne Mahnke were again present at District Four and additional conversation ensued. The police personnel present at this time included Lieutenant Robert Bradley and Detective Robert Costello. As noted earlier, Mahnke was represented by counsel at this time, and there is no evidence that the defendant ever made any statements to the police out of the presence of his attorney.

However, there is conflicting testimony on the question of whether George Mahnke ever made any statements at all on September 24, 1970. Lieutenant Bradley testified that there was some discussion about the conflicting stories given by Mahnke on September 16-17, but this conversation was with Attorney Bulger and Mahnke never said a word. Lieutenant Bradley further testified that there was some discussion about "mud on the defendant's shoes" and about a lie-detector test, but again the conversation was with Attorney Bulger and Mahnke never opened his mouth.

Detective Costello testified quite to the contrary and claims that the defendant made numerous statements on September 24, the substance of which he reduced to a writing and which was admitted into evidence as Exhibit 16. Costello claims that Lieutenant Bradley questioned Mahnke, not Attorney Bulger, about the statements made on September 16. Bradley allegedly asked Mahnke whether he "left Miss Bornstein at a phone booth and gave her $10 and she was pregnant," and Mahnke replied, "That's what happened." In addition, Costello himself asked Mahnke about having mud on his pants and shoes on the night of September 15, and Mahnke responded that he got mud on his pants through playing football in the Fenway earlier in the evening with some friends he didn't know. Mahnke made both of these statements in the presence of counsel and at a time when neither Bradley nor Costello considered Mahnke as having committed any crime.

Attorney William Bulger's recollection of the conversation at District Four on September 24 offers a third variation on this theme. He claims that Lieutenant Bradley was present on September 24 for only a few short moments, and that he did not ask any questions of the defendant, George Mahnke. He does recall some conversation between Mahnke and Detective Costello but that Mahnke never made any *denials* of statements which he had previously made to Lieutenant Bradley on September 16. Attorney Bulger claims that the only statements made by Mahnke were on "peripheral" matters such as Miss Bornstein's trip to California and about her individual habits. However, he does remember some conversation about the fact that it was raining on September 15, that George had walked with her (Miss Bornstein), that she was troubled, and then he (Mahnke) left her. Attorney Bulger denies that there was any conversation about leaving Miss Bornstein at a telephone booth or any discussion about a football game in the Fenway or any declaration by Mahnke that "this is the statement I'll stand by." Bulger further testified that he was somewhat confused about this interview on September 24 and another interview at his own office on December 22, 1970, and it is possible that he may be confusing the two. However, he did state that Exhibit 16, which was Costello's recollection of the conversation on September 24, is not, in his opinion, an accurate report of what transpired.

Thus, from the testimony of the three persons present on September 24, it is not entirely clear what statements were made by George Mahnke, or if any statements were made at all. However, it is clear that if any statements were made they were made in the presence of counsel and with his express or implied consent.

There was no further conversation concerning whether or not the defendant would take a lie-detector test, and if he did agree to take one who would pay for it. The versions of this part of the conversation are completely conflicting, and in any event I rule as a matter of law that conversations taking place at the police station on September 24, 1970 concerning themselves with a lie-detector test are inadmissible, and I allow the motion to suppress to at least that extent.

The ultimate true facts as to what took place at the interview with the police on September 24, 1970 are to be determined by the jury empaneled to try these issues. It is not necessary that I determine truth. I therefore rule as a matter of law that Mahnke was competently represented by counsel of his own choosing at this interview, and any statements which he, the defendant Mahnke, made in response to questioning by anybody there present if otherwise relevant and material are admissible in evidence. To that extent I deny the motion to suppress. I further rule that any conversations which took place between any of the police conducting the interrogation and Attorney Bulger in which Mahnke did not participate by making statements, even though they were made in his presence, are inadmissible, and with reference to statements of that category I allow the motion to suppress.

FINDINGS AND RULINGS ON STATEMENTS MADE BY THE DEFENDANT, GEORGE MAHNKE, ON DECEMBER 22, 1970

I have made previous findings that Detective Stanley Gawlinski set up a meeting with Attorney Bulger to interview his client, the defendant Mahnke, at his office on December 22, 1970. The meeting did in fact take place as agreed and designated, and Detective Gawlinski interviewed George Mahnke and in the presence of his counsel, William Bulger, and his mother, Shirley Mahnke. This interview commenced between 11 a.m. and 12 noon on December 22, 1970 and lasted between thirty minutes and one hour. Detective Gawlinski interrogated Mahnke and Mahnke voluntarily answered the questions which were asked. The interview was conducted not only in the presence of, but with the consent of, Mahnke's attorney. Under these circumstances, I rule that any statements made by Mahnke are admissible in evidence, and with reference to the interview of December 22, 1970 as aforesaid I deny the motion to suppress.

FINDINGS AND RULINGS ON STATEMENTS MADE BY THE DEFENDANT, GEORGE MAHNKE, ON DECEMBER 10, 1971, AT THE MASSACHUSETTS GENERAL HOSPITAL

After the defendant Mahnke left Ferreri's automobile in the vicinity of his home on December 9, after the events at Worthington and the discovery of the body at Sears & Roebuck, he was met by his mother at the door of his home at 20 Imrie Road in Brighton at approximately 7:30 p.m. He had an extremely ugly black eye, and after a conversation with his mother he was taken by both of his parents to the Massachusetts General Hospital. He was admitted to the emergency ward at approximately 8:05 and remained in the emergency ward until about 1:15 a.m. He was examined by an admitting physician, Dr. Mendelsohn, and assigned to a hospital room at approximately 2 a.m His parents left the hospital ten minutes later. Almost immediately upon their son's return to his home, his parents called Attorney Bulger and related to him completely what had happened to their son from the time of his kidnapping on December 8 until his return home, and also informed him of the physical injuries which were apparent upon his body, namely the black eye. Attorney Bulger, at

7:30 p.m., called Detective Gawlinski at home and was unable to talk to him because of his absence. He left a message and a request that Detective Gawlinski return his telephone call. The call was never returned, and again at 10:30 p.m. he called Detective Gawlinski at his home and was unable to talk to him because he was not then at home. Detective Gawlinski never returned that telephone call. Detective Gawlinski was fully aware of the fact that Bulger was, in fact, his attorney on all matters relating to this indictment. Detective Stanley Gawlinski in fact was not at home when these telephone calls were made. He had spent the afternoon and evening of December 9 at Northeastern University attending classes and studying at the library. He returned to his home in Roslindale at approximately 11:30, and as he came through the door his wife was on the phone with Manuel Bornstein. Manuel Bornstein then related to him that Rhonda's body had been discovered and described precisely where the body could be found. After he got through talking with Manuel Bornstein, he was informed by his wife that Attorney Bulger had called him and was very anxious to talk to him. He did not return Attorney Bulger's calls nor make any effort to contact him.

Detective Gawlinski notified his superiors and left his home almost immediately and went to the area where the body had been discovered. He left the area and went to Mahnke's home at 20 Imrie Road in Brighton. He was accompanied by Detective Frank Sheehan, Sergeant John Daley, Detective Smith, and Detective Murphy. This group arrived at the Mahnke residence at about 3 a.m. and they were told that George was at the Massachusetts General Hospital, and Detective Gawlinski was told by Mahnke's parents that Attorney Bulger had been trying to reach him all night. I find that not only Detective Gawlinski but also Detective Sheehan, at least, had knowledge of the fact that William Bulger was Mahnke's counsel. The evidence is unclear as to whether or not Sergeant Daley, Detective Smith, and Detective Murphy heard Mahnke's parents tell Gawlinski that Attorney Bulger had been trying to reach him all night. I nevertheless find as an inescapable inference that they also knew that Mahnke was represented by counsel.

The group of police officers above described left Mahnke's residence and arrived at the Massachusetts General Hospital on December 10 at 3:30 a.m. in the company of Harold Krause, a police stenographer. Detective Sheehan, Sergeant Daley, and Harold Krause went to Mahnke's room, and Detective Gawlinski and Detectives Smith and Murphy remained in the hospital lobby. The detectives were allowed to speak to Mahnke. He was being interviewed in a four-bed ward and they spoke to him about fifteen minutes. He was then wheeled out into the hallway and the interrogation continued in the hallway. He was then removed to a private room. Harold Krause kept a stenographic record of the interrogation, and his transcript, Exhibit 15, indicates the interrogation started at 4:45 a.m. and ended at 4:55 a.m. I find this is not the fact. It may well be that an official record and the transcript of the questions and answers contained therein started at 4:45 and ended at 4:55. I find, however, that the interrogation in fact started immediately upon the arrival of the police at 3:30 a.m. The transcript consists of approximately three and one-half pages. It took an hour of questioning to provide the questions and answers which appear on three and one-half pages of transcript. I find as a fact that Sergeant Daley read the *Miranda* warnings to Mahnke, and I further find that Mahnke was requested to read the *Mirand* warning card. mahnke did not respond either affirmatively or negatively on the precise question of whether or not he understood the warnings. The transcript reveals that Mahnke remained silent in response to a number of questions, while answering other questions. During the interview, he asked on at least four occasions to see his parents and to have his parents present. On each occasion the interrogating police officers rebuked him and continued to ask him questions.d Mahnke finally said he would no longer talk to the detectives while the stenographer was present. At about 5 a.m. the stenographer was asked to leave the room, and they moved out of the hallway and into another room.

After Mahnke was moved to the other room, the two detectives continued to question him. This questioning continued from approximately 5 a.m. until 7:30 a.m. This interrogation was not recorded, nor is there any evidence that the Miranda warnings were given to him other than the initial instance referred to above. During this latter period of questioning between 5 a.m. and 7:30 a.m., Mahnke allegedly made a statement in which he admitted killing Rhonda Bornstein and burying her body along side the abandoned railroad tracks. The statement was reduced to writing by Sergeant Daley at 8:30 a.m. on December 10, Exhibit 14 in this proceeding. During this interrogation, I find that Mahnke answered some questions and on other questions would remain completely silent until such time as he was asked a question that he did answer. At no time during this two and one-half hour interrogation did Mahnke request to see a lawyer, nor did he ever specifically refuse categorically to answer questions, although he did remain silent at times and did not answer. He did not doze or fall asleep during the interrogation. He had received no drugs or medication. With the exception of the black eye, the hospital report indicates that he was normal in all respects. There was no trauma to any other part of the body and there was no physical indications of concussion.

With reference to the entire interrogation which was conducted at the hospital on December 10, 1971, I find that insofar as the police were concerned Mahnke was then a prime suspect. I find that upon leaving the hospital the police officers went to the Municipal Court of Roxbury and lodged a complaint charging the defendant Mahnke with the murder of Rhonda Bornstein. On the evidence, Detective Sheehan stated that before he left the hospital at the conclusion of interrogation, he had concluded that he was going to arrest

Mahnke for the crime charged based on all the evidence and the rational inferences therefrom. I find that before this group of police officers went to the hospital, and in view of the information then in their possession, they intended to make a forthwith arrest of Mahnke. When they left the hospital, they left a police officer as security outside his hospital door.

I am completely unable to understand why Detective Gawlinski did not accompany the officers to Mahnke's room during the interrogation. The only inference that I can draw is that he knew he was represented by counsel and that he, Gawlinski, knew he had had counsel for many months, and he deliberately refrained from making that specifically and positively known to his brother officers. At no time while this extended interrogation was going on is there any evidence before me upon which I can find that Gawlinski made an effort to have Attorney Bulger notified that an interrogation was taking place or to give him a reasonable opportunity to be present. This conduct on the part of prosecuting officers was at least heedless, if not deliberate, and I can conclude only that it was a course of conduct calculated to circumvent Mahnke's constitutional rights to have the benefit, aid, and counsel of his attorney.

So far as Mahnke was concerned, I find that he was physically and mentally alert as evidenced by his conscious decision to answer some of the officers' questions and to remain silent as to others. As indicated previously, the medical report showed no trauma except for his black left eye. All tests for concussion or internal injuries were negative. Mahnke's eyesight and reading ability were apparently unimpaired because he requested to read the *Miranda* warning card. There is no evidence whatsoever that Mahnke dozed off while being questioned, or that he in any way became unconscious. From a medical viewpoint, Mahnke was physically capable of being questioned because the officers obtained the permission of Mahnke's doctor prior to interviewing him. Furthermore, Mahnke had some say in the conditions existing at the time of the interview as evidenced by his demand that stenographer Krause be dismissed. In light of the foregoing subsidiary findings, I make the inescapable ultimate finding that Mahnke's statements at Massachusetts General Hospital on December 10, 1971 were freely and voluntarily made, untainted by any coercion, duress or overreaching on the part of the police. This finding is quite obvious from the cagey and calculated manner in which Mahnke weighed the consequences of each question and answer, and the proper and delicate way in which the overall interview was conducted (see Exhibit 15).

I find that when Mahnke was given the *Miranda* warnings to read he was capable of fully grasping the significance and scope of his rights. Mahnke was a fairly mature twenty-one-year-old engineering student at Northeastern University who clearly had the mental facilities to understand the *Miranda* warnings, and I find that this understanding was not altered by his possibly weakened physical condition which may have then existed. In fact, Mahnke even began to enforce his rights by remaining silent and by asking to see his parents. Thus, I find as a necessary subsidiary fact that Mahnke knew and understood his constitutional rights guaranteed by *Miranda* and, by making the statements which he did make, voluntarily waived his right to remain silent. However, in view of my finding that Gawlinski and Sheehan were well aware that Mahnke was represented by Attorney Bulger and that Attorney Bulger was desperately trying to reach Gawlinski, I can only conclude that Mahnke's right to have the assistance of an attorney was seriously and irreparably violated. Furthermore, I can nowhere find an intelligent and knowing waiver of this right by Mahnke so as to vitiate the original illegality.

Mahnke stated during this interrogation that he had killed Rhonda Bornstein and buried her body alongside the abandoned railroad tracks. Insofar as that basic statement is concerned, I find that Mahnke did in fact make it under the circumstances which would render it voluntary and he knew what he was saying. Based upon the foregoing findings, I rule as a matter of law that there was an invasion of Mahnke's basic constitutional rights in this area of interrogation because Mahnke was denied the assistance of counsel, and I suppress the entire police interview at the hospital of Mahnke by the detectives of the Boston Police Department on December 10, 1971.

An issue of law has been advanced and argued that all statements made by Mahnke are admissions only and not confessions, and that they therefore are admissible as admissions under controlling Massachusetts law irrespective of coercion and duress. Insofar as it may be material, I find as a fact, and rule as a matter of law, that all of the statements made by Mahnke are admissions only and cannot be found or construed to be a confession because they lack an acknowledgement of guilt of the essential elements of the entire crime charged. Nevertheless, in view of the intolerable circumstances under which the statements by Mahnke were made at the cabin in Worthington and the inherent unreliability of statements coerced by violence and duress, I suppress the statements there made because I am unable to rationalize a legal philosophy making them admissible and not at the same time violating Mahnke's constitutional basic rights.

There is considerable evidence coming from Mahnke that during all the time they held him in custody, and particularly on those occasions when I have indicated in my findings that fear and duress ceased to overcome his mind and actions, that he had been threatened that they had his brother in custody and used that as a means to compel him to do and say what they wanted him to say. I find as a fact that no such threat was ever made at any time, and particularly when he left the cabin at Worthington and the group was confronted by the Chief of Police and the hunter, and has been used by the defendant only as an excuse to explain what was otherwise clearly voluntary action and statements on his part.

RULINGS OF LAW ON THE FOUR MOTIONS TO SUPPRESS

In light of the foregoing findings and rulings, and in order to make myself explicitly clear on these extensive and complex issues of law and fact, I make the following summary of facts and ultimate rulings of law on Motions #1 (motion to suppress statements made to private persons) and #3 (motion to suppress discovery of the body by private persons):

(1) The actions of the five "concerned citizens" (Ferreri, Fontacchio, Fisher, Heard, and Campbell) on December 8 and 9, 1971 were entirely *private* acts done entirely without knowledge or authority of any police or prosecuting authority. The actions of these five young men were reprehensible and I thoroughly condemn them, and such conduct would be even more despicable if done under the auspices or sponsorship of a public authority. However, I find that this is not the case. Detective Gawlinski's conduct was entirely proper throughout the investigation, and he repeatedly warned the Bornsteins against the commission of a kidnapping or any other form of illegality. While Gawlinski worked very closely with the Bornsteins in the investigation of the disappearance during the early part of 1971, I find that after the incident at Bryant's in August he was so thoroughly disgusted with the actions of the Bornsteins and their friends that he never even spoke to them again until the night of December 9, 1971. In light of the foregoing, I rule that the actions of the "concerned five" at Worthington were private actions and must be judged with this characterization in mind.

(2) When a private person questions a possible defendant, it is not necessary that he advise the defendant of his rights under *Miranda v. Arizona*, 384 U. S. 436, 444 (1966), *Commonwealth v. White*, 353 Mass. 409, 414-417 (1967).

(3) However, it is necessary that an interrogation by private persons be conducted in a thoroughly proper manner, so that the statements adduced therefrom will not be tainted with duress, coercion, or involuntariness. 3 WIGMORE, EVIDENCE, §833 at 457 (Chadbourn rev. ed. 1970), *Commonwealth v. Martin,* 357 Mass. 190 (1970). If a defendant's statement is coerced, it makes no difference whether the person practicing the coercion is a police officer or a private individual, WHARTON'S CRIMINAL EVIDENCE, §348 at 11 (12th ed. 1955). Therefore, I rule as a matter of law that statements made by the defendant, George Mahnke, at any time on the evening of December 8, 1971 or during the day of December 9, 1971 up to 4:15 p.m. must be excluded from evidence because "in light of the totality of the circumstances, the will of the defendant had been overborne so that the statement was not his free and voluntary act," *Procunier v. Atchley,* 400 U. S. 446, 453 (1971). consequently, I grant the defendant's motion #1 but only up to the late afternoon of December 9, 1971 at precisely 4:15. p.m.

(4) As previously noted, I am not unmindful of the fact that controlling Massachusetts case law attaches few safeguards to the admissibility of *admissions* than are attached to the admissibility of *confessions*. *Commonwealth v. Dascalakis,* 243 Mass. 519, 521 (1923), *Commonwealth v. Haywood,* 247 Mass. 16, 18 (1923), *Commonwealth v. Gleason,* 262 Mass. 185, 189-90 (1928). While Mahnke's statements constituted admissions and not confessions, I can only reiterate my earlier finding that the statements at the cabin prior to 4:15 p.m. were so inherently unreliable and made under circumstances which are so blatently coercive and overreaching, that I can only conclude that such admissions must be excluded from evidence.

(5) The conduct of the defendant after 4:15 p.m. clearly indicates to me that the relationship and atmosphere among

the group changed drastically, and that the gross coercion exerted on Mahnke ceased to exist entirely. From the time the group left the cabin and encountered the two hunters until Mahnke was dropped off at his home at about 7 p.m., I find that his actions and statements were entirely voluntary and the result of a free will. I make this finding based on the following subsidiary facts: (a) Prior to leaving the cabin, Mahnke offered to pay for some of the food which was purchased; (b) When the hunters appeared and threatened to "blow their guts out if there was any funny business," Mahnke stood idly by and did nothing; (c) When riding down the Massachusetts Turnpike, the conversation was lose and casual and Fontacchio and Campbell slept most of the way; (d) When exiting from the Massachusetts Turnpike at Weston, Mahnke voluntarily contributed part of the toll fare; (e) After they left Storrow Drive and headed for Sears & Roebuck, Mahnke was in complete control of the situation—he gave all the directions on where to go and even told Ferreri to try and lose Heard and Fisher who were in the other car; (f) The casual, relaxed, and volunteered conversation with Heard in the Sears parking lot was totally free of any fear or duress, and was not even solicited by Heard; (g) When going down the tracks to the location of the body, Mahnke was totally in charge of the situation as he had a knife at Ferreri's back; (h) When returning from the location of the body, Mahnke was unaccompanied by any of his five "captors" and could have easily walked onto the MBTA platform, but instead Mahnke chose to return to the rest of the group in the parking lot; (i) during the course of these events at Sears & Roebuck, there were numerous shoppers and commuters passing through the parking lot between Sears and the MBTA station, and Mahnke never made any effort to request assistance; (j) When Ferreri dropped Mahnke off at his home, Mahnke requested that Ferreri do him a favor by not turning in the body until after Christmas so that his family could have a good Christmas; (k) After Mahnke made the foregoing request, the "concerned group" debated for approximately two hours before any action was taken, thus showing an attempt to honor the defendant's request. Throughout this three-hour period, I find that the relationship between Mahnke and the "concerned group" was friendly and amicable and free from any duress or coercion which may have previously existed. Therefore, any statements or actions by the defendant during this time period of from 4:15 p.m. to 7 p.m. are admissible into evidence if otherwise competent and material, and thus I deny the defendant's motion to suppress these statements.

(6) In addition, I find that any statements made by the defendant at this time amounted only to *admissions* and not *confessions* because they did not amount to an "acknowledgment of guilt of the entire crime charged." MOTTLA, PROOF OF CASES IN MASSACHUSETTS, §94 at 102 (2d ed. 1966). Consequently, under the controlling Massachusetts law hereinbefore mentioned, the defendant is not entitled to the safeguards with respect to their admissibility which he would have received had they been construed as confessions, *Commonwealth v. Chapman*, 345 Mass. 251, 254 (1962). For this reason also, I rule that the defendant's motion to suppress statements made from 4:15 p.m. to 7:00 p.m. on December 9, 1971 should be denied.

(7) It has been suggested that statements made during the 4:15 to 7 p.m. period, as well as the discovery of the victim's body on the railroad tracks, must necessarily be a "fruit" of the original illegality and therefore must also be suppressed under the "fruit" of the original illegality and therefore must also be suppressed under the "fruit of the poisonous tree" doctrine, *Harrison v. United States*, 392 U. S. 219 (1968). I find this contention wanting and I reject it for the following reasons. First of all, I can find no case which has ever held that the "poisoned fruits" doctrine is applicable to private persons. If the purpose of the rule is to prevent the prosecution from prospering through their own illegality, then I do not see

how it can apply to the present situation where private individuals committed the illegal acts. Secondly, I find as a fact that the discovery of the body near Sears & Roebuck was not a "fruit" of the original involuntary statement because this evidence did not *flow from* this statement, which is necessary to make it a "fruit," WIGMORE, supra, §859 at 559. During the original statement at the cabin, Mahnke only said that the body was "in Boston near Sears & Roebuck," without describing the location with any greater particularity. Consequently, I cannot find that the discovery of the body was in consequence of the original invalid statement, *Commonwealth v. James*, 99 Mass. 438, 441 (1868). Finally, consistent with the findings and rulings which I have made heretofore, I find that any statements or evidence obtained following the illegal confession admissible because "the connection between the illegality and the evidence offered is so attenuated as to dissipate the taint," *Nardone v. United States*, 308 U. S. 338, 341 (1939). Although the separation between the illegality and later evidence is very brief in terms of time, I clearly find as a fact from the 2,267 pages of pretrial testimony, as well as the bearing and demeanor of the witnesses which appeared before me, that the change in circumstances was so total and complete and the relationship among the parties was so vastly altered, that the taint of any illegality was entirely dissipated. Thus, on the basis of the foregoing reasons I reject the "poisoned fruits" argument and deny the defendant's motion to suppress on the basis of this argument.

(8) In addition, I further find that the subsequent search for and the discovery of the body by the Worthington group in no way violated Mahnke's rights under the Fourth Amendment because the Fourth Amendment right to be secure from unreasonable searches and seizures does not apply to searches by private individuals, *Burdeau v. McDowell*, 256 U. S. 465 (1921). Moreover, I further find that Mahnke lacks the requisite standing to object to the search for and discovery of

the body, since he has neither a possessory nor proprietary interest in the "places searched or objects seized," *Jones v. United States*, 362 U. S. 257 (1960), *Simmons v. United States*, 390 U. S. 377 (1968). Therefore, for this reason also, I rule that the evidence pertaining to the search for and the discovery of the body of Rhonda Bornstein near the railroad tracks on the night of December 9, 1971 is admissible as evidence at the trial in chief, and thus I deny defendant's motion #3 to suppress the discovery of the victim's body because it is not violative of the Fourth Amendment.

(9) Since I have found that the statements made by Mahnke at the cabin prior to 4:15 p.m. were made involuntarily, I rule as a matter of law that these statements are inadmissible for any purpose whatsoever. Not only are they inadmissible as evidence for the substantive facts asserted therein, but they are also inadmissible for the purpose of impeaching the defendant's credibility should he testify at the trial in chief. When statements are obtained involuntarily they are inadmissible for any purpose, *Commonwealth v. Kleciak*, 350 Mass. 679, 690 (1966), *Harris v. New York*, 401 U. S. 222, 224 (1971). On the other hand, any statements made by the defendant between 4:15 p.m. and 7 p.m. on December 9, 1971 will be admissible as substantive proof or for impeachment.

In connection with the defendant's motion to suppress statements made on September 16-17, 1970, September 24, 1970, and December 24, 1970, which has been labeled Motion #4, I make the following summary of facts and ultimate rulings of law:

(1) The interrogation of the defendant at District Four police headquarters on September 16-17, 1970 by Detective Sheehan and Lieutenant Bradley was conducted in a free and voluntary, noncustodial manner. Mahnke clearly was not a suspect in the commission of any crime, because as far as the

police were concerned no crime had yet been committed. At this time, the defendant was simply a friend of the missing girl, Rhonda Bornstein, who the police thought may have some information which would lead to her whereabouts. Therefore, I repeat and reaffirm my earlier ruling that the police were under no obligation to give Mahnke his *Miranda* warnings because there is no evidence whatsoever that this questioning by the police amounted to "custodial interrogation," which is required in order for *Miranda* to apply, *Miranda v. Arizona*, 384 U. S. 436, 444 (1966). In addition, there is no indication that this questioning was tainted by any form of coercion, duress, force, or undue influence which would result in a finding that these statements were involuntary. Consequently, I rule that these statements are admissible for any purpose and deny this part of defendant's Motion #4.

(2) As indicated earlier, the testimony on the events of September 24, 1970 at District Four when Mahnke was interviewed by the police for a second time is in hopeless conflict. The question of whether Mahnke made certain statements on this date or whether he made any statements at all, is not my province. My only concern is with the surrounding circumstances at the time these statements were allegedly made, and whether the defendant's constitutional rights under the Fifth, Sixth, and Fourteenth Amendments were protected. In light of the fact that the defendant was competently represented by Attorney William Bulger at this time, and that Attorney Bulger was present with Mahnke during the entire period at District Four, and furthermore that there was no evidence at all of any duress or coercion on the part of the police, I rule as a matter of law that any statements allegedly made by Mahnke at this time are admissible at the trial in chief, and it is for the factfinder to believe or disbelieve that such statements were actually made. However, I restrict this ruling to statements made by the defendant relative to

the substantive issues involved in this indictment, and thus I necessarily suppress any statements by Mahnke or others relative to the taking of a lie-detector test because of its inherent prejudice to the defendant, as well as any statements made by Attorney Bulger in the presence of Mahnke but which were not participated in by Mahnke.

(3) The interrogation of the defendant by Detective Stanley Gawlinski at Attorney Bulger's office on December 22, 1970 was quite obviously conducted in a proper manner at a time when the defendant was represented and advised by competent counsel, and in a setting which leaves no doubt that any statements adduced therefrom were entirely voluntary. Therefore, I summarily deny the defendant's motion to suppress his statements made on December 22, 1970.

The final motion to suppress is labeled Motion #2 and involves statements made by the defendant on December 10, 1971 at Massachusetts General Hospital.

(1) I have ruled as a matter of law that any and all statements made by the defendant to police officers Sheehan and Daley on the morning of December 10, 1971 at the Massachusetts General Hospital must be suppressed in their entirety and may not be used at the trial in chief except for the limited purpose of impeachment should the defendant decide to testify (see infra p.). Since the interrogating parties at this time were public police officials acting pursuant to official business, we must view the situation in light of the higher standards placed on such police officials starting with *Miranda v. Arizona*, 384 U. S. 436 (1966) and continuing to the present. With this voluminous case law as a background, I make the following subsidiary rulings:

(a) Unlike the situation back on September 16-17, 1970 when Mahnke was simply a friend with some possible information, the investigation of Rhonda Bornstein's disappearance at this time had ceased to be "a general inquiry of an unsolved crime but had begun to focus on a particular suspect." *Escobedo v. Illinois*, 378 U. S. 478, 490 (1964). As a matter of fact, Mahnke was the *only* suspect and a prime one at that. Although at the time of their arrival at the hospital Mahnke had not yet been placed under official arrest, I find as a fact, and rule as a matter of law, that this interrogation at the Massachusetts General Hospital clearly amounted to "custodial interrogation" as that term is defined under *Miranda*, *Orozco v. Texas*, 394 U. S. 324, 326-27 (1969). Thus, at this time, Mahnke was a suspect in the murder of Rhonda Bornstein (and he was officially placed under arrest shortly after the interrogation terminated) and was interviewed in an atmosphere of "custodial interrogation."

(b) When the police officers went to Massachusetts General Hospital to question the defendant, Detectives Gawlinski and Sheehan knew for a fact that Mahnke had retained an attorney to represent him and that said attorney was desperately trying to get in touch with Gawlinski, and it appears that Sergeant Daley was quite well aware of this attorney-client relationship as well. To subject the defendant to an extensive interrogation under these circumstances flies directly in the face of the constitutional mandates enunciated in *Massiah v. United States*, 377 U. S. 201 (1964) and *Commonwealth v. McKenna*, 355 Mass. 313 (1969). The crux of these decisions is that once an attorney has entered the proceedings so that the defendant is represented by counsel, it is violative of the Fifth, Sixth, and Fourteenth Amendments to question the defendant in the absence of counsel. Therefore, any statements obtained by the police at this time at Massachusetts General Hospital are constitutionally inadmissible as evidence and must be suppressed prior to trial. The apparent deception and circumvention practiced by Gawlinski in remaining downstairs only solidifies this view and clearly leads me to believe that the police were well aware that they were treading on constitutional thin ice.

(c) I have found as a fact that the police informed Mahnke of his rights under *Miranda*, that Mahnke read the *Miranda* warning card, and furthermore that Mahnke fully understood the scope and extent of these rights. Mahnke had been exposed to three police interrogations in the last fifteen months, and although he was never given his *Miranda* warnings on any of these occasions, I can only conclude that Mahnke was sophisticated enough to know the importance and scope of his right to remain silent and his right to have the assistance of an attorney. While Mahnke at first remained silent, I find that he freely and voluntarily waived his right to remain silent by the fact that Mahnke subsequently made a complete statement to the police concerning the disappearance and death of Rhonda Bornstein. While the prosecution has a "heavy burden" in showing a waiver, *Miranda v. Arizona*, supra at 475, I believe that this burden has been met and that a voluntary waiver by Mahnke of his right to remain silent has been shown. However, I cannot find from the pretrial testimony or the reasonable inferences therefrom that Mahnke ever made a voluntary waiver of his right to retain counsel. Mahnke was advised of his right to counsel, and I have found as a fact that he fully understood this right and the means of enforcing it; but it conclusively appears to me that the warning to Mahnke that he "has a right to the presence of an attorney" was simply a hollow exhortation, merely recited but not respected, when in fact an attorney was desperately trying to get in touch with the investigating officers and their cohorts. Under these circumstances, a simple recitation of the required verbal formula will not suffice to overcome the very serious constitutional objection which has been raised, *Commonwealth v. McKenna*, supra at 324, and consequently any so-called "waiver" is incapable of being voluntary and intelligent. This view of the facts is further confirmed by

Mahnke's numerous requests to see and speak to his parents. Although Mahnke was twenty-one years of age at this time, and thus an adult for all intents and purposes, these requests indicate to me that Mahnke wanted the assistance of someone at this crucial period. For this and the foregoing reasons, I find that the defendant Mahnke did not make an intelligent and voluntary waiver of his right to counsel.

(d) The foregoing finding and ruling that any and all statements made by the defendant Mahnke at Massachusetts General Hospital on December 10, 1971 must be suppressed, because they were made in violation of the defendant's right to retain counsel, in no way alters my earlier finding that these statements were voluntary. In order for a statement obtained by police to be admissible, the dictates of *Miranda* must be complied with, but, in addition, the basic test of voluntariness must also be met, *Davis v. North Carolina*, 384 U. S. 737, 740-41 (1966). As indicated in my earlier statement and findings of fact (supra p.), there is no evidence to indicate that Mahnke's statement at Massachusetts General Hospital was anything other than voluntary. There was no evidence that Mahnke was sick or weak, *Reck v. Pate*, 367 U. S. 433 (1961), that he was drugged or medicated, *Leyra v. Denno*, 347 U. S. 556 (1954), or that the interrogation was conducted in an unreasonably lengthy or grueling manner, *Haynes v. Washington*, 373 U. S. 503 (1963), *Ashcraft v. Tennessee*, 322 U. S. 143 (1943). Quite to the contrary, there is uncontradicted evidence of voluntariness such as the courteous and temperate manner in which Mahnke was questioned, *Ashdown v. Utah*, 357 U. S. 426 (1958), as well as the fact that Mahnke was an intelligent and educated young man, *Lisenba v. California*, 314 U. S. 219 (1941), who was clearly advised of his constitutional rights, *Clewis v. Texas*, 386 U. S. 707 (1967). Thus, on the basis of these foregoing considerations, I find as a fact and rule as a matter of law that any statements made by the defendant to the police at Massachusetts General Hospital were voluntary.

The foregoing finding of voluntariness in obtaining these statements does not improve their status to the point that they are admissible. I have suppressed them and they will remain suppressed *except* for the limited purpose of impeaching the defendant should he decide to testify at the trial in chief, *Harris v. New York*, supra at 226. The *Harris* case indicates that statements obtained in violation of *Miranda* will be admissible for this limited purpose only, *provided that* they are found to be voluntary. Unlike the statements obtained at Worthington, which were involuntary and which I suppressed for any purpose whatsover, I find and rule that these statements obtained at the hospital are voluntary and thus may be used for the limited purpose of impeachment.

CONCLUSION

MOTION #1 I deny in part and grant in part the defendant's motion #1 to suppress certain statements allegedly made to private persons after the defendant had been forcibly kidnapped on December 8 and December 9, 1971.

MOTION #2 I grant in its entirety the defendant's motion #2 which seeks to suppress certain statements allegedly made by the defendant to the police at an interrogation which took place at the Massachusetts General Hospital on December 10, 1971.

MOTION #3 I deny in its entirety the defendant's motion #3 which seeks to suppress statements and actions leading to the discovery of the body of the deceased near Sears & Roebuck on the early evening of December 9, 1971.

MOTION #4 I deny that part of the defendant's #4 which seeks to suppress certain statements made to the Boston Police at Division Four of the Boston Police Department on September 16 and 17, 1970 as well as statements made to the Boston Police on December 22, 1970 at the law offices of William Bulger, Esq., 11 Beacon Street, Boston.

I deny that part of the defendant's motion #4 which seeks to suppress statements made concerning a lie detector test or statements not made by the defendant Mahnke personally, which is suppressed.

By the Court,
Walter X. McLaughlin
Justice of the Superior Court

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Supreme Judicial Court
for the Commonwealth
Law 15,376

COMMONWEALTH
vs.
GEORGE WAYNE MAHNKE

ORDER

This case has been argued before the full court on the defendant's exceptions saved upon the defendant's motions to suppress and during jury trial before a judge of the Superior Court. The court is of opinion that, for the further consideration of the argument, it should have before it more complete findings by the trial judge with respect to the voluntariness or involuntariness of the statements made by the defendant, from the time of the departure from the cabin through and including the interrogation at the Massachusetts General Hospital, with attention to:

(a) The issue characterized in the authorities cited as "break in the chain of events," that is, whether or not those statements of the defendant can fairly be separated from the circumstances of the defendant's earlier statements. See, e.g., *Lyons* v. *Oklahoma*, 322 U. S. 596 (1944); *Leyra* v. *Denno*, 347 U. S. 556 (1954); *Reck* v. *Pate*, 367 U. S. 433 (1961); *Clewis* v. *Texas*, 386 U. S. 707 (1967); *Darwin* v. *Connecticut*, 391 U. S. 346 (1968); *Goldsmith* v. *United States*, 277 F. 2d 335 (D. C. Cir. 1960), cert. den. sub nom. *Carter* v. *United States*, 364 U. S. 863 (1960).

(b) The issue characterized in the authorities cited as "cat out of the bag," that is, whether those statements were or were not in substance the direct product of the earlier statements, in that the defendant was motivated to make them because, having made the earlier statements, he felt he had little or nothing to lose by repeating or amplifying them. See, e.g., *Commonwealth* v. *Spofford*, 343 Mass. 703 (1962); *United States* v. *Bayer*, 331 U. S. 532, 540 (1947); *Darwin* v. *Connecticut*, 391 U. S. 346, 350-351 (1968) (Harlan, J., concurring in part and dissenting in part); *Harrison* v. *United States*, 392 U. S. 219, 224-226 (1968); *United States* v. *Gorman*, 355 F. 2d 151, 157 (2d Cir. 1965), cert. den. 384 U. S. 1024 (1966); *Evans* v. *United States*, 375 F. 2d 355, 360-361 (8th Cir. 1967); *Gilpin* v. *United States*, 415 F. 2d 638, 641-642 (5th Cir. 1969); *United States* v. *Robinson*, 439 F. 2d 53, 562 (D. C. Cir. 1970).

ORDERED, accordingly, that the case is retained by the full court upon its docket; that the trial judge is directed to make the more complete findings above described on the basis of the evidence on the motions to suppress and at trial; and that the transcripts be returned to the Superior Court temporarily for that purpose.

By the Court,
Frederick J. Quinlan
Clerk

January 8, 1975

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
No. 62578

COMMONWEALTH
V.
GEORGE W. MAHNKE

SUPPLEMENTARY FINDINGS OF FACT ON DEFENDANT'S MOTIONS TO SUPPRESS EVIDENCE

Pursuant to the order of the Supreme Judicial Court dated January 8, 1975, the Court has reviewed the transcript of the hearing on the aforementioned Motions to Suppress. As a consequence and upon reconsideration thereof, I hereby expressly reiterate and reaffirm my findings of fact and rulings of law as stated in the "Findings of Fact and Rulings of Law on Defendant's Motion to Suppress Evidence" previously filed in this case.

I further find that the facts surrounding the initial admission in the cabin in Worthington did not control the character of or circumstances relating to subsequent admissions near the Sears and Roebuck store and at the Massachusetts General Hospital. Specifically, I find there was a "break in the chain of events" between the first statements made at the cabin in Worthington and the later statements made near Sears and Roebuck and at the Massachusetts General Hospital.

This "break in the chain of events" was characterized by a change in attitude on the part of Mahnke and those who were accompanying him.

I find that sometime after the first statements aforementioned were made, the members of the "concerned group" discussed whether they should leave Mahnke in Worthington with some of the group or take him with them to Boston. I find that Mahnke wanted to go back to Boston and specifically wanted to drive with Ferreri. For some reason not clear, Mahnke and Ferreri had established a certain degree of friendship and the situation became one of *mutual* trust between these two people. As a result, Mahnke felt that he had regained the power and the will which he had previously lost. Despite inferences that others might have drawn from the situation, I find that Mahnke felt himself sufficiently in control that he could exercise choice, a free will and make discriminating decisions. This ability was evidenced by his failure to cry out or otherwise attempt to effect an escape though there were many times when he could have done so, *e.g.*, when he was leaving the cabin in Worthington and saw Chief Tyler and Mr. Liimatainen; while stopped at toll booths on the Massachusetts Turnpike going back to Boston; while near the MBTA station near Sears and Roebuck. I find that Mahnke knew he could have effected an escape and not only said so but affirmatively decided, for reasons sufficient for him, not to do so. I further find that Mahnke's decision not to do so was a result of the changed attitude of all of the parties as well as Mahnke's feeling that he no longer needed or wanted to be rescued from the situation; his fifteen-month emotional nightmare was at an end.

I find that on the trip back to Boston, only Mahnke and Ferreri were awake in one car; the conversation they had, consistent with the change in the situation, was friendly; it was not about Rhonda Bornstein.

Because Mahnke was no longer in fear and satisfied with the course of conduct he was then pursuing, he had no reason to request the assistance of others to effect an escape.

He freely and voluntarily directed Ferreri to drive to the approximate location of the body. Mahnke's belief at this point that he was in control and had freedom of choice is indicated by the fact that he initially told the "concerned group" that he would not go down to the place where Rhonda Bornstein's body was buried. He explained his attitude by saying the burial place was "spooked." I find this was an inartful way of expressing a natural aversion to seeing the result of his alleged misdeed. In any case, this aversion was not deeply held and he consented to go down to the burial spot, at least to a degree where he could point out the location of the body, when it became apparent that his knowledge of the exact burial spot was necessary. Regardless, he felt free, was free, and did in fact depart the area rather than remain to see the corpse uncovered.

Mahnke evidently had a wish to get things off his chest. He was very relieved after he gave his first statement in the cabin in Worthington.

I find that Mahnke evidenced no fear of culpability, but rather exhibited a sense of bravado in stating that he was not worried about criminal prosecution because he could get F. Lee Bailey to defend him and because they ("the concerned group") would be hostile witnesses. Such statements, and the actions which accompanied them, showed a completely different state of mind from that preceding the first statements at the cabin in Worthington. I find that they show a person possessed of the free and unfettered choice to decide what, if anything, he wanted to say, and to carefully weight and evaluate the possible consequences to him of what he did say.

This latter fact is reinforced by the defendant's giving new and additional information at Sears and Roebuck. There was no "cat out of the bag" aspect to these statements and actions because the defendant was no longer afraid of the "concerned group" and because he had no fear of the information being used against him. He was free to refuse to speak or to effect an escape. I find that the additional information given was not in any sense the result of a feeling that it would be useless to deny further knowledge, and concerned itself with new disclosures not previously disclosed in the cabin.

The statements made at the Massachusetts General Hospital were made to different people, at a different place under no threats of coercion; they were substantially separated in time from the statements made at Worthington. Despite the time of day and his recent past experiences, the defendant was alert, responsive, and discriminating in what he said and to whom. He knew Detective Sheehan, one of the interrogators, and so indicated. I find that the defendant was not in an impaired physical or psychological state; his faculties were normal. The only evidence of concussion came from the history of the patient taken upon his admittance to the Massachusetts General Hospital; this history was given either by the defendant or his mother. I find that the defendant exhibited no signs of concussion or "black outs" during his interrogation or throughout his stay at the hospital.

I further find that the defendant had a complete understanding of his rights; at various times he chose to exercise those rights by remaining silent. Mahnke objected to the presence of the stenographer, and the stenographer was then removed; Mahnke, at various times, also posed questions to the officers who were interrogating him. These were, I find, the actions of an astute, intelligent young man who knew what his rights were and who freely and voluntarily chose to speak. I find that the defendant was free to confess or deny his suspected participation in the crime. As mentioned previously, the defendant did not feel his prior statements made to members of the "concerned group" were useable against him. Hence, he could not have been motivated to make the statements at the Massachusetts General Hospital because he felt he had nothing to lose. Rather, I find that the defendant was, in both instances, motivated and impelled by a desire to get things off his chest. At no time did he disaffirm any statements previously made as being the result of kidnapping, beating or duress.

As previously stated, I find that all statements here in issue made after 4:15 p.m. on December 9, 1971 were freely and voluntarily given. I find that there was a "break in the chain of events" at this time and that none of the statements made subsequent to this time were the direct result of the prior involuntary statements.

The Supreme Judicial Court, by its aforementioned order, has directed the Court's attention to various cases relating to the issues characterized as "break in the chain of events" and "cat out of the bag." The Court feels compelled, in view of this fact, to comment on some of those cases.

It is necessary to consider the "totality of the circumstances" in determining whether a statement of a defendant should be found voluntary. *Clewis v. Texas*, 386 U. S. 707 (1967). In doing so, the court must decide whether the accused, at the time he confesses, is in possession of "mental freedom" to confess or deny a suspected participation in a crime. *Ashcraft v. Tennessee*, 322 U. S. 143 (1943); *Lyons v. Oklahoma*, 322 U. S. 596 (1944).

In *Lyons, supra* the court stated that

> When conceded facts exist which are irreconcilable with such mental freedom, regardless of the contrary conclusions of the triers of fact, whether judge or jury, this Court cannot avoid responsibility for such injustice by leaving the adjudication solely in other hands. But where there is a dispute as to whether the acts which are charged to be coercive actually occurred, *or where different inferences may fairly be drawn from admitted facts, the trial judge and the jury are not only in a better position to appraise the truth or falsity of the defendant's assertions from the demeanor of witnesses but the legal duty is upon them to make the decision.*
>
> *Lyons* at 602 citing
> *Lisenba v. California*, 314 U. S. 219, 238 (1941).
> (Emphasis supplied.)

In the instant case, I have found unquestionably coercive conduct requiring the suppression of statements obtained thereby; however, I have further found, from disputed testimony, that there was a break sufficient to render subsequent statements untainted by the prior coercion. This testimony is disputed only by Mahnke and his evidence on this issue I completely disbelieve. (I refer at this time to occurrence outside the cabin where the police chief and the hunters were present.) Moreover, the jury, after comprehenssive instructions on their right and duty to make an independent judgment as to voluntariness, found as evidenced by their verdict that the admitted portions of evidence were provided by Mahnke voluntarily. It should be noted that this is not a case where a defendant, dazed, bewildered, so tired he could hardly speak, under physical pain, and intense psychological pressure finally confessed. *Compare, Leyra v. Denno,* 347 U. S. 556 (1954). Nor is this a case where the defendant was a mental retard, extremely nervous, in pain, under medication, held virtually incommunicado by police for four days until he finally made an admission after having been confronted by confessions of alleged co-participants in the crime. *Compare, Reck v. Pate,* 367 U. S. 433 (1961). In *Clewis v. Texas,* 368 U. S. 707 (1967), the Court held there was no "break in the stream of events" from the time the defendant was taken into the police station until he made the confession there in issue. However, in that case, the defendant had only a fifth grade education; his faculties were impaired by inadequate sleep and food, and he was sick. In the case at bar, the defendant had been fed, and I have found that he was an intelligent young man whose faculties were unimpaired.

Similarly, in *Darwin v. Connecticut*, 391 U. S. 346 (1968), there was no break where the defendant was in constant custody of the police and where the first confession was obtained only after the defendant had fainted. In contrast, the later statements in this case occurred in a different environment, i.e. one which was removed geographically and characterized by the total absence of any members of the "concerned group," the lack of any coercive conditions, and the availability of medical assistance. In addition, the statements at the Massachusetts General Hospital were made to entirely different people; there were no threats of coercion.

United States v. Bayer, 331 U. S. 532 (1947) held that despite the inadmissibility of a first confession, a second confession was admissible where it was made six months later and where the defendant, under administrative restrictions which allowed him to leave the military base only with leave, made statements of facts not in the original statement. The second statement was labeled a "supplementary" statement; it was basically the same as the first except it went into more detail. In the instant case, the statements made near Sears and Roebuck and at the Massachusetts General Hospital contained new important facts; they were not mere details of the prior involuntary statement. I have found that Mahnke was free to speak or not to in both of these instances. While the time sequence in *Bayer, supra*, is more extended than that in the case at bar, the additional information presented in the voluntary statements in this case make them more remote from the prior confession than that in the *Bayer* case.

The additional information given by Mahnke in his later statements together with the finding that he was not afraid that his prior statement could be used against him warrant a finding of no causal relationship between the first statement and the later statements. *Compare, Evans v. U. S.*, 375 F.2d 335 (8th Cir., 1967); *Gilpin v. U.S.*, 415 F. 2d 638 (5th Cir., 1969).

I therefore reaffirm my previous findings and rulings.

By the Court,
Walter X. McLaughlin
Chief Justice of the Superior Court